Supreme Court of the United States

OCTOBER TERM, 1969

No. 403

UNITED STATES OF AMERICA,

Petitioner,

—v.—

GERRITT JOHANNES VAN LEEUWEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 51441

THE UNITED STATES

vs.

GERRITT JOHANNES VAN LEEUWEN

DOCKET ENTRIES

DATE	PROCEEDINGS
1968	
May 22	Filed Indictment.
May 24	Ent. Arraignment and Plea, not guilty.
"	Ent. order setting trial for June 24, 1968, 9:30 A.M. Remanded.
May 31	Filed Court Reporter's Transcript of Procedeings on 5-24-68.
June 4	Ent. order setting pretrial conference June 13, 1968, 9 a.m. Counsel notified.
Jun 13	Entered record of pretrial hearing. Any motions will be heard on June 21, 1968 at 3:00 P.M.
Jun 17	Filed Government's Praecipe. Issued 10 subpoenas in duplicate and in blank.
Jun 17	Filed Stipulation that coins offered in evidence are gold.
Jun 18	Filed Government's Trial Memorandum.

DATE	PROCEEDINGS
1968	
June 19	Filed Defendant's motion to suppress evidence and controvert search warrant.
"	Filed Memorandum in support of above motion.
Jun 20	Filed Plaintiff's Requested Instructions.
Jun 21	Filed Plaintiff's Memorandum of Authorities in Opposition to Defendant's Motion to Suppress Evidence, and Controvert Search Warrant.
Jun 21	Filed Affidavit of R. J. O'Hearn in Opposition to Defendant's Motion to Suppress.
Jun 22	Entered order denying motion to suppress.
June 24	ENT. RECORD OF TRIAL BY JURY (1st day) Paul Tveten, Reporter. Exhibits.
"	Filed Defendant's decision not to testify.
"	Ent. order denying motion for acquittal.
June 25	Filed Plaintiff's requested instructions.
"	ENT. RECORD OF TRIAL BY JURY (2nd day). Reporter Tveten.
"	Juror NO. 10 replaced by alternate Harry M. Frickelton.
"	Filed Verdict, Guilty as charged.
"	Imposition of sentence set for July 12, 1968, 9:30 a.m. Presentence report ordered. Deft. remanded.
July 3	Filed Defendant's Motion for Judgment of Acquittal, N.O.V., or in the alternative for a new trial.
July 3	Filed Defendant's Memorandum in Support of Motion for Judgment of Acquittal N.O.V., or in the alternative, for a new trial.

DATE	PROCEEDINGS
1968	
July 3	Filed Marshal's Return on Plaintiff's Subpoena to Testify-Charles A. Belgard and 1.
July 11	Filed Memorandum in Opposition to Defendant's Motion for Judgment of Acquittal Notwithstanding the Verdict or in the Alternative for a new trial. (7-12-68) Motion for New Trial Denied.
July 12	SENTENCE: Three years imprisonment and $1500.00 fine. Remanded.
July 12	Filed and entered Judgment and Commitment. Issued Commitment.
July 15	Filed Court Reporter's Transcript of Proceedings —6-12-68.
July 22	Filed Notice of Appeal.
"	Mailed duplicate Notice and Statement of Docket Entries to Clerk, U.S. court of Appeals.
"	Handed Copy of Notice to U.S. Attorney. Mailed copy to Defendant.
Jul 31	Filed Marshal's Return on Judgment and Commitment.
Aug 6	Entered Order granting 30 day extension to transmit record on appeal. Counsel notified.
Sep 16	Filed defendant's Motion and Affidavit for Extension of Time for Transmission of Record on Appeal.
Sep 16	Lodged Order Extending Time for Transmission of Record.
Sep 17	Filed Order Extending Time for Transmission of Record on Appeal to October 21, 1968.
Oct 17	Filed Transcript of Proceedings by Court Reporter, of June 24, 1968. (Clerk's file copy)
Oct 21	Filed Agreed Statement for Record on Appeal.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 51441

UNITED STATES OF AMERICA, PLAINTIFF

vs.

GERRIT JOHANNES VAN LEEUWEN, DEFENDANT

INDICTMENT—Filed May 22, 1968

The Grand Jury charges:

That on or about March 28, 1968, GERRIT JOHANNES VAN LEEUWEN did fraudulently and knowingly import and bring from a foreign country, namely Canada, into the United States at Blaine, Washington, within the Western District of Washington, Northern Division, merchandise, to wit, two packages, each weighing approximately ten pounds, containing a total of approximately 785 assorted gold coins, said importing and bringing being contrary to law, to wit, Title 19 U.S.C., Sections 1459 and 1461, and Title 31 U.S.C., Sections 442 and 443 and 31 C.F.R., Section 54.

All in violation of Title 18 U.S.C., Section 545.

A TRUE BILL

DATED: May 21, 1968.

/s/ [Illegible]
Foreman

/s/ Eugene G. Cushing
EUGENE G. CUSHING
United States Attorney

/s/ William H. Rubidge
WILLIAM H. RUBIDGE
Assistant U. S. Attorney

AFFIDAVIT FOR SEARCH WARRANT

Commissioner's Docket No. 10

Case No. 117

UNITED STATES OF AMERICA

vs.

TWO PACKAGES BEARING REGISTERED ARTICLE NOS. 1204 AND 1205; 1 PACKAGE ADDRESSED TO HARRY GORDON, P.O. BOX 2133, VAN NUYS, CALIFORNIA, THE OTHER PACKAGE ADDRESSED TO DAVIS CARR, P.O. BOX 7646, NASHVILLE, TENNESSEE

BEFORE WALTER J. RESEBURG, JR., 304 U.S. Courthouse, Seattle

The undersigned being duly sworn deposes and says:

That he has reason to believe that on the premises known as United States Post Office, Mount Vernon, Washington in the Western District of Washington there is now being concealed certain property, namely registered article No. 1204 bearing the return address of G. J. Williams, No. 8 Campus Village, Skagit Valley Junior College, Mount Vernon, Washington, addressed to Harry Gordon, P.O. Box 2133, Van Nuys, California; and registered article No. 1205 bearing the return address of G. J. Williams, No. 8 Campus Village, Skagit Valley Junior College, Mount Vernon, Washington, addressed to Davis Carr, P.O. Box 7646, Nashville, Tennessee, which are believed to contain gold coins which were brought into the United States in violation of Title 18, U.S.C. 545.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

1. Your affiant has information through United States Customs channels that the addressees on the packages in question are known dealers in the illegal traffic of gold coins. This information came from U.S. Customs Agents.

2. Your affiant has received information that when the packages were deposited with Post Office authorities in Mount Vernon, Washington, in response to an inquiry by the Postal Clerk to determine the contents of the packages, it was stated that the packages contained coins.

3. Each of the packages is insured for $10,000.

4. The residence indicated as the return address on each package is now unoccupied and has been unoccupied for six weeks.

5. Your affiant has information obtained from Capt. Charles Bellgard of Mt. Vernon Police Dept. indicating that the persons who mailed the packages at Mount Vernon, Washington, were driving an automobile with Canadian license plates.

/s/ R. J. O'Hearn,
R. J. O'HEARN
Signature of Affiant.
Customs Agent
Official Title, if any.

Sworn to before me, and subscribed in my presence, March 29, 1968.

/s/ Walter J. Reseburg, Jr.
United States Commissioner.

SEARCH WARRANT

Commissioner's Docket No. 10

Case No. 117

UNITED STATES OF AMERICA

vs.

TWO PACKAGES BEARING REGISTERED ARTICLE NOS. 1204 AND 1205; 1 PACKAGE ADDRESSED TO HARRY GORDON, P.O. BOX 2133, VAN NUYS, CALIFORNIA, THE OTHER PACKAGE ADDRESSED TO DAVIS CARR, P.O. BOX 7646, NASHVILLE, TENNESSEE

To R. J. O'Hearn, Customs Agent, or other authorized Customs Agent

Affidavit having been made before me by R. J. O'Hearn, Customs Agent that he has reason to believe that on the premises known as United States Post Office, Mount Vernon, Wash. in the Western District of Washington, there is now being concealed certain property, namely registered article No. 1204 bearing the return address of G. J. Williams, No. 8 Campus Village, Skagit Valley Junior College, Mount Vernon, Washington, addressed to Harry Gordon, P.O. Box 2133, Van Nuys, California; and registered article No. 1205 bearing the return address of G. J. Williams, No. 8 Campus Village, Skagit Valley Junior College, Mount Vernon, Washington, addressed to Davis Carr, P.O. Box 7646, Nashville, Tennessee, which are believed to contain gold coins which were brought into the United States in violation of Title 18, U.S.C. 545, and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime and if the

property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 29 day of March, 1968.

/s/ Walter J. Reseburg, Jr.
WALTER J. RESEBURG, JR.
U. S. Commissioner.

RETURN

I received the attached search warrant March 29, 1968, and have executed it as follows:

On March 29, 1968 at 6:30 o'clock PM, I searched the premises described in the warrant and

I left a copy of the warrant with MR. LELAND A. NOVOTNY together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

Registry No. 1204 addressed to Harry J. Gordon, P. O. Box 2133, Van Nuys, California.

25 Austro Hungarian Coins 1915
100 U. S. $20 gold coins various dates

Registry No. 1205 addressed to Davis Carr, P. O. Box 7646, Nashville, Tenn.

660 Gold coins various denominations, countries of origin and dates.

This inventory was made in the presence of Donald Davis and Donald Peck, Postal Inspectors, Leland A. Novotny, Asst. Post Master, Robert S. Baker and Ronald D. Harding, Customs Agents and Charles Belgard, Captain, Mt. Vernon Police Department.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

/s/ R. J. O'Hearn

Subscribed and sworn to and returned before me this 8 day of April, 1968.

/s/ Walter J. Reseburg, Jr.,
U. S. Commissioner.

COMPLAINT

Commissioner's Docket No.

Case No.

Complaint for Violation of U. S. C. Title 18, Section 545

UNITED STATES OF AMERICA

v.

GERRIT JOHANNES VAN LEEUWEN

BEFORE RICHARD FLEESON, 215 Mason Building, Bellingham, Wn.

The undersigned complainant being duly sworn states:

That on or about March 28, 1968, at Blaine, Washington in the Western District of Washington, Northern Division, (1) GERRIT JOHANNES VAN LEEUWEN did (2) fraudulently and knowingly import and bring from a foreign country, namely Canada, into the United States, merchandise, to wit, 2 packages, each weighing approximately 10 pounds, containing a total of approximately 785 assorted gold coins, said importing and bringing being contrary to law, to wit, Title 19 U.S.C., Sections 1459 and 1461, and Title 31 U.S.C., Section 442 and 443 and 31 C.F.R., Section 54.

And the complainant states that he is the Customs Agent in Charge, stationed at Seattle; that his investigation reveals that on March 28, 1968, the defendant entered the United States from Canada at Blaine, Washington, having in his possession 2 packages containing gold coins, said coins not being declared and invoiced.

/s/ Raphael J. O'Hearn,
RAPHAEL J. O'HEARN
Signature of Complainant.
Customs Agent in Charge,
Official Title.

Sworn to before me, and subscribed in my presence, April 15, 1968.

/s/ Richard Fleeson,
United States Commissioner.

COMMISSIONER'S FINAL COMMITMENT

Commissioner's Docket No. 1

Case No. 312

UNITED STATES OF AMERICA

v.

GERRIT JOHANNES VAN LEEUWEN

To: The United States Marshal of the Western District of Washington;

You are hereby commanded to take the custody of the above named defendant and to commit him with a certified copy of this commitment to the custodian of a place of confinement within the Western District of Washington approved by the Attorney General of the United States where the defendant shall be received and safely kept until discharged in due course of law. The above named defendant was arrested upon the complaint of Raphael J. O'Hearn charging that on or about March 28, 1968, in the Western District of Washington, the defendant did fraudulently and knowingly import and bring from a foreign country, namely Canada, into the United States, merchandise, to-wit, 2 packages, each weighing approximately 10 pounds, containing a total of approximately 785 assorted gold coins, said importing and bringing being contrary to law, to-wit: in violation of U.S.C. Title 19 Sections 1459 and 1461, and Title 31 U.S.C. Section 442 and 443 and 31 C.F.R., Section 54, and he, (having duly waived preliminary examination before me on , 19) (after examination by me on , 19 , where it appeared that there is probable cause to believe that the offense so charged has been committed and that he has committed it[1]), has been directed to furnish bond in the sum of Five [/s/ R.F.] Thousand dollars ($5,000.00) [/s/ R.F.] for his appearance in the United States District court for the Western District of Washington at Seattle in accordance with all orders and di-

rections of the court relative to his appearance before the court, and he has failed to do so.

Dated: April 15, 1968.

/s/ Richard Fleeson,
United States Commissioner.

RETURN

Received this commitment and designated prisoner on 4/26, 1968, and on 4/26, 1968, committed him to Whatcom County Jail pending transfer, and left with the custodian at the same time a certified copy of this commitment.

Dated: ....., 19....

/s/ Raphael J. O'Hearn,
United States Marshal.
Customs Agent in Charge.
District of

By .....
Deputy

[Caption Omitted]

MOTION TO SUPPRESS EVIDENCE AND CONTROVERT SEARCH WARRANT—Filed June 19, 1968

The Defendant, GERRIT JOHANNES VAN LEEUWEN, moves by his attorney, CRAIG G. DAVIS, for an order pursuant to Rule 41 (e) of the Federal Rules of Criminal Procedure that all evidence, oral or tangible, be suppressed which was obtained directly or indirectly from:

(a) The arrest, detention and interrogation of the Defendant on April 12, 1968, said arrest, detention and interrogation being in violation of Defendant's constitutional rights and right to prompt arraignment under Rule 5 (a) of the Federal Rules of Criminal Procedure.

(b) The search and seizure of property from premises known as the United States Post Office located in Mount Vernon, Washington, on March 29, 1968, said search and seizure being in violation of Defendant's rights under the Fourth Amendment to the United States Constitution.

As grounds for this motion, counsel for the Defendant states:

1. The Defendant is charged in a one-count indictement alleging violation of Title 18 U.S.C., Section 545 that is, fraudulently and knowingly importing and bringing from a foreign country undeclared merchandise, namely gold coins.

2. On April 13, 1968, Defendant was arrested at the Whatcom County Jail, located in Bellingham, Washington, by virtue of a formal WARRANT OF ARREST issued by Richard Fleeson, United States Commissioner. Prior to that time Defendant was stopped at or about 9 to 9:30 p.m. at the U. S. boarder at Blaine, Washington and held for a period of time until approximately 2:30 a.m., April 13, at which time he was interrogated by customs officials. He was not advised of his right to counsel and, after interrogation of his two companions, was placed under arrest. This arrest was made without

a warrant and without probable cause to believe that the Defendant has committed a felony.

3. Prior to his formal arrest, the Defendant together with his companions, was forcibly detained at the border and held for a period of time exceeding five hours without being charged. He was then questioned by customs officials from Seattle, Washington but was not informed of his right to counsel. He requested permission to telephone but this was denied and the questioning continued. He was thereupon deposited in the Whatcom County Jail located in Bellingham, Washington and held over the weekend and was arrested as noted above on April 15, 1968. He was not brought before the United States Commissioner for at least three days. The delay in arraignment was unnecessary and in violation of his rights under Rule 5 (a), Federal Rules of Criminal Procedure. In addition, the nature of the questioning of Defendant and his companions, without counsel, make the statements made involuntary and the result of violations of the Fourth, Fifth, and Sixth Amendments of the United States Constitution.

4. Said seizure was unlawful because:

(a) it was made pursuant to a warrant and affidavit relying on hearsay evidence;

(b) it was made pursuant to a warrant and affidavit which did not allege facts sufficient to support a belief that the property sought was on the premises of the United States Post Office located in Mount Vernon, Washington;

(c) it was made pursuant to a search warrant issued as a result of an affidavit which stated facts not within the affiant's own knowledge;

(d) said package was illegally detained for a period of approximately eighteen hours contrary to law, in order that a search warrant could be issued to search the parcel.

(e) it was made pursuant to an illegal and unauthorized detention by postal authorities on their own behalf or at the behalf of the customs agents, all in violation of Defendant's rights under the Fourth Amendment of the United States Constitution.

WHEREFORE, Counsel respectfully prays that the Court order the suppression of all evidence resulting from the official illegality alleged herein.

DATED: June 18, 1968.

Respectfully submitted,

/s/ Craig G. Davis
CRAIG G. DAVIS
Attorney for Defendant
421 B.N.B. Bldg.
Bellingham, Washington 98225
Tel. (206) 733-8191

[Caption Omitted]

AFFIDAVIT OF R. J. O'HEARN IN OPPOSITION TO DEFENDANT'S MOTION TO SUPPRESS—Filed June 21, 1968

The undersigned, being first duly sworn on oath, deposes and says that he is the Agent in charge of the Seattle office of the United States Customs Agency Service.

That at approximately 2:35 p.m. on March 28, 1968, he received information by telephone from Sgt. James McKenzie, Royal Canadian Mounted Police, Vancouver, B. C., that two parcels, each being approximately 8″ x 6″ x 2″ in size and weighing approximately 15 pounds apiece, were mailed at the United States Post Office, Mount Vernon, Washington.

That, further, each package was insured for $10,000 and they were addressed to specific individuals in Van Nuys, California, and Nashville, Tennessee.

That Captain Charles A. Belgarde, Police Department, Mount Vernon, Washington, had information that the packages were deposited in the mail by persons riding

in a 1966 maroon-colored Ford Mustang automobile bearing B. C. license plates.

That following this telephone conversation, he immediately called the Customs Agent in charge, Los Angeles, California, where one of the packages was to be delivered, and was told that the Customs Office covering that particular area had the addressee of the package under investigation for engaging in the illegal traffic in gold coins.

That early the following morning (March 29, 1968), he called the Customs Agent in charge, Mobile, Alabama, which officer has jurisdiction over Nashville, Tennessee, and was told that the Customs Office covering that particular area had the addressee under investigation for engaging in the illegal traffic of gold coins.

That he informed the Postmaster and Postal Inspector in charge, Mount Vernon, Washington, that he had probable cause to believe the packages had been smuggled into the United States from Canada and that they contained illegal gold coins.

That he continued investigation without undue delay and in the early afternoon of March 29, 1968, obtained a search warrant to open the packages which had been deposited in the mail in the Post Office at Mount Vernon, Washington. Pursuant to the authority indicated in the search warrant, the packages were opened and found to contain approximately 780 gold coins of various types.

That on April 12, 1968, at approximately 9:30 p.m., he received information that GERRIT JOHANNES VAN LEEUWEN, along with two other individuals, had attempted to enter the United States at the border at Blaine, Washington, and were then detained at United States Custom station at the border. This affiant immediately left in the company of Robert Baker, United States Custom's Agent, for the Customs station at Blaine, Washington, where they arrived at approximately 1:00 a.m., April 13, 1968.

That he was present when Agent Baker advised GERRIT JOHANNES VAN LEEUWEN of his rights under the United States Constitution and was present when MR. VAN LEEUWEN indicated that he wished to re-

main silent. MR. VAN LEEUWEN did not make a statement either before or after arrest in the early morning of April 13, 1968, nor has he made any statement, written or oral, to United States Customs Agents at any time subsequent to his arrest.

That GERRIT JOHANNES VAN LEEUWEN was placed in the custody of the sheriff of Whatcom County at approximately 4:30 a.m. on Saturday, April 13, 1968. That on April 15, 1968, at 3:00 p.m., he was taken before U. S. Commissioner Richard Fleeson, Bellingham, Washington, at which time a complaint charging him with violation of Title 18 U.S.C., Section 545, was filed.

That this affidavit is being made in opposition to the defendant's motion to suppress the evidence in this matter.

Dated this 21st day of June 1968.

/s/ R. J. O'Hearn
R. J. O'HEARN

Subscribed and sworn to before me on this 21st day of June, 1968.

/s/ [Illegible]
Notary Public

[Caption Omitted]

AGREED STATEMENT FOR RECORD ON APPEAL

ISSUE

WHETHER THE DEFENDANT'S CONSTITUTIONAL RIGHTS UNDER THE 4th AMENDMENT WERE VIOLATED BY THE DETENTION OF DEFENDANT'S FIRST CLASS MAIL BY EITHER THE POSTAL AUTHORITIES OR THE CUSTOM'S OFFICIALS, OR BOTH; AND/OR

WHETHER DEFENDANT'S MOTION, MADE PURSUANT TO F.R.C.P. 41(e), SHOULD HAVE BEEN GRANTED.

PRESENTATION OF ISSUE IN DISTRICT COURT

The issue was first brought to the Court's attention in a "MOTION TO SUPPRESS EVIDENCE AND CONTROVERT SEARCH WARRANT", said motion being denied.

The issue was again raised during trial by oral motion and was denied.

It was presented for the final time in a *"MOTION FOR JUDGMENT OF ACQUITAL NOTWITHSTANDING THE VERDICT, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL"*, said motion being denied and the court stating that it did not feel the packages were illegally detained.

FACTS ESSENTIAL TO THE ISSUE PRESENTED

The jury, by its verdict, found that the Defendant crossed the United States Border at Blaine, Washington, with two packages in his possession which were not declared, said packages containing gold coins.

In the "Affidavit for Search Warrant" we find that the Defendant mailed two packages at the Mount Vernon, Washington, Post Office to two different addresses—one in California and one in Tennessee. That the return address showed G. J. Williams, # 8 Campus Village,

Skagit Valley Junior College, Mount Vernon, Washington. That the packages were sent registered mail and declared to contain coins or a coin collection and that each package was insured for $10,000.

The testimony of Gerald D. Thomsen, a postal clerk in the United State Post Office at Mount Vernon, Washington, shows that the proper postage and rates were paid.

The testimony of Fred Sopow shows that the packages were mailed at approximately 1:30 p.m. on Thursday, March 28, 1968. A search warrant was issued on Friday, March 29, 1968 at 3:00 p.m. in Seattle and was duly served in Mount Vernon at 6:30 p.m.

The contents of the packages were gold coins as shown by the inventory attached to the return on the search warrant.

The testimony of Raphael J. O'Hearn, Customs Officer, shows that he knew about the parcels sometime between 2:00 p.m. and 3:00 p.m. on Thursday, March 28, 1968.

The assistant Post Master of the Mount Vernon Post Office testified that he was suspicious of the contents of the packages and that he was concerned as to their mailability. Further, his testimony at the pretrial hearing indicated that he felt it was his duty to seek an advisory opinion as to whether or not the packages should be dispatched to their destination.

Testimony given and elicited at the trial indicated that Mr. Thomsen, the postal clerk, and a Captain Belgard of the Mount Vernon Police Department, who happened to be on the premises at the time, were suspicious of the men mailing the packages. Captain Belgard called a Sergeant James E. McKenzie of the R.C.M.P. in Vancouver, B. C., Canada, who in turn passed the information on to customs officer O'Hearn. Officer O'Hearn in

turn contacted the Postal Inspector in Mount Vernon and verified the packages.

APPROVED this 21 day of October, 1968.

/s/ William T. Beeks
Judge
United States District Court

Presented by:

/s/ Craig G. Davis
CRAIG G. DAVIS
Attorney for Defendant

Approved:

/s/ William H. Rubidge
For United States Attorney

[Caption Omitted]

SENTENCE PROCEEDINGS—July 12, 1968

[fol. 1] THE CLERK: United States versus Gerrit Johannes Van Leeuwen, Cause No. 51441.

MR. RUBIDGE: Your Honor, this matter is on for imposition of judgment and sentence. I believe preliminarily that the defendant has a motion that he wishes to argue at this time.

[fol. 2] THE COURT: Yes, I think the Court indicated that he could argue his postrial motions that he has filed at this time. He may do so.

(Mr. Davis presented oral argument to the Court.)

THE COURT: The motion will be denied. The defendant may come forward for sentence.

MR. DAVIS: If the Court please, may I have the particular reason the Court is using for the denial of the motion?

THE COURT: I deny it on general grounds. You just have not satisfied me that this judgment is contrary to the evidence. I found the seizure was perfectly proper, and I also found that the evidence was overwhelming as to this defendant's guilt. I am convinced beyond a reasonable doubt of all aspects of it.

MR. DAVIS: Thank you, your Honor.

• • • •

JUDGMENT AND COMMITMENT

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

No. 51441

UNITED STATES OF AMERICA

v.

GERRIT JOHANNES VAN LEEUWEN

On this 12th day of July, 1968 came the attorney for the government and the defendant appeared in person and [1] with his appointed counsel Craig Davis.

IT IS ADJUDGED that the defendant has been convicted upon his plea of [2] not guilty, and a verdict of guilty of the offense of violation of Title 18 U.S.C. Section 545, as charged in the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of [4] three (3) years and fined the sum of fifteen hundred dollars ($1,500).

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ William T. Beeks,
United States District Judge.

Presented by:

/s/ William H. Rubidge
WILLIAM H. RUBIDGE
Assistant U. S. Attorney

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 23449

UNITED STATES OF AMERICA, APPELLEE

vs.

GERRITT JOHANNES VAN LEEUWEN, APPELLANT

(May 29, 1969)

On Appeal from the United States District Court for the Western District of Washington, Northern Division

Before: CHAMBERS and KOELSCH, *Circuit Judges*, and * SOLOMON, *District Judge*

SOLOMON, *District Judge:*

Gerritt Johannes Van Leeuwen was convicted of illegally importing gold coins into the United States in violation of 18 U.S.C. § 545. He claims the post office violated the Fourth Amendment when it detained two first class packages without a warrant. He also claims an affidavit in support of a search warrant was insufficient. We reverse on the basis of Appellant's first claim.

On March 28, 1968, at about 1:30 P.M., Appellant mailed two twelve-pound packages at the post office in Mount Vernon, Washington. He sent both packages by first class mail and insured each for $10,000. Appellant told the postal clerk that the packages contained coins. As appellant was leaving the post office, the clerk told Captain Belgard of the Mount Vernon police that he was suspicious of the packages. Captain Belgard noticed that Appellant's car had British Columbia license plates and that the return address on the packages was a vacant housing area of a neighboring junior college.

* Honorable Gus J. Solomon, United States District Judge, District of Oregon, sitting by designation.

Captain Belgard called Sergeant McKenzie of the Canadian police, who, in turn, called R. J. O'Hearn, Customs Officer-in-charge at Seattle, Washington. At about 3:00 P.M. O'Hearn called the Customs office in Van Nuys, California, the destination of one of the packages. He learned that the addressee was under investigation for trafficking in illegal coins. O'Hearn could not reach the Customs office at Nashville, Tennessee, the destination of the other package, because of the time difference. When he called the next morning, he learend that the addressee of the second package was also suspected of trafficking in gold coins. O'Hearn secured a search warrant and opened the packages at 6:30 P.M. on March 29. The Mount Vernon post office detained the packages for 29 hours, between the time they were mailed and the execution of the warrant. No judicial officer authorized this detention.

First class mail is protected by the Fourth Amendment. *Ex Parte Jackson*, 96 U.S. 727 (1878). *Oliver* v. *United States*, 239 F. 2d 818 (8th Cir. 1957). In *Lustiger* v. *United States*, 386 F. 2d 132 (9th Cir. 1967), the Court said:

> "The protection against unreasonable search and seizure of one's papers or other effects, guaranteed by the Fourth Amendment extends to their presence in the mails * * *. Thus, first class mail *cannot be seized and retained*, nor opened and searched, without the authority of a search warrant." 386 F. 2d 139. (Emphasis added.)

The Fourth Amendment protects "the right of the people to be secure * * * in their papers and effects, against unreasonable searches and seizures." The information known to Captain Belgard immediately after Appellant mailed the packages would reasonably have justified a brief detention, without a warrant, while a further investigation could be made. *Terry* v. *Ohio*, 392 U.S. 1, 20-21 (1968); *cf. Warden* v. *Hayden*, 387 U.S. 294 (1967).

By 3:00 P.M., O'Hearn knew that the addressee of one of the packages was under investigation for traffick-

ing in gold coins. This additional fact supplied probable cause to search the packages. Instead, O'Hearn decided to wait until the following day so he could call the customs office at the destination of the second package. This decision represents an understandable exercise of caution. Nevertheless, as a result of this delay, the packages were detained for 29 hours at the post office. This period was unreasonably long, and the officers should have obtained a warrant authorizing the detention. *Katz* v. *United States*, 389 U.S. 347 (1967); *Lustiger* v. *United States*, *supra*; *see Davis* v. *Mississippi*, * * * U.S. * * *, 37 USLW 4359 (1969); *Camara* v. *Municipal Court*, 387 U.S. 523 (1967).

In *Katz*, the Government urged the Court to "retroactively validate" the conduct of its agents who had eavesdropped on the defendant's telephone conversations. The Government argued that the agents "did no more than they might properly have done with prior judicial sanction." 389 U.S. at 356. The Court rejected this argument:

> "It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer * * *. Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' * * * for the Constitution requires 'that the deliberate, impartial judgment of a judicial officer * * * be interposed between the citizen and the police * * *.'" 389 U.S. at 356-57.

In the present case, the length of time that the packages were retained by the post office made prior judicial authorization necessary.

The Government cites *United States* v. *Beckley*, 335 F. 2d 86 (6th Cir. 1964). There, the package involved was mailed from outside the country and was not in first class mail.

The Government also claims that Appellant has no standing to object to the seizure because he was not the addressee or the return addressee of the packages. There

is no merit to this contention. *Jones* v. *United States*, 362 U.S. 257 (1960).

The seizure of Appellant's packages violated his rights under the Fourth Amendment and the gold coins should not have been admitted in evidence. *Weeks* v. *United States*, 232 U.S. 383 (1914).

Reversed.

CHAMBERS, *Circuit Judge*, concurring:

I think I am as sensitive as anyone to the Fourth Amendment in protecting one's person and one's home. But the detention of Van Leeuwen's "hot money" at the post office for 29 hours does not offend me very much. Someone in the post office holds up much of my mail over 29 hours.

I concur in the reversal only because I think precedent, which we must follow, requires us to reverse.

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 23449

UNITED STATES OF AMERICA, APPELLEE

vs.

GERRIT JOHANNES VAN LEEUWEN, APPELLANT

Appeal from the United States District Court for the Western District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Northern Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

Filed and entered May 29, 1969.

SUPREME COURT OF THE UNITED STATES

No. 403, October Term, 1969

UNITED STATES, PETITIONER

v.

GERRIT JOHANNES VAN LEEUWEN

ORDER ALLOWING CERTIORARI—Filed October 27, 1969

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 369721 350

In the Supreme Court of the United States

OCTOBER TERM, 1969

No.

UNITED STATES OF AMERICA, PETITIONER

v.

GERRITT JOHANNES VAN LEEUWEN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case entered on May 29, 1969.

OPINION BELOW

The opinion of the court of appeals (App. A, pp. 7–10, *infra*) is not yet reported.

JURISDICTION

The judgment of the court of appeals (App. B, p. 11, *infra*) was entered on May 29, 1969. On June 26, 1969, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including July 28, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

358-108—69

QUESTION PRESENTED

Whether the Fourth Amendment is violated when post office officials detain packages believed to contain illegal matter for the short period of time needed to check some facts and apply for a warrant.

STATEMENT

After a jury trial in the United States District Court for the Western District of Washington, respondent was convicted of illegally importing from Canada two packages containing gold coins, in violation of 18 U.S.C. 545. He was sentenced to imprisonment for three years and fined $1,500.

At about 1:30 p.m. on Thursday, March 28, 1968, respondent mailed two twelve-pound packages at the post office in Mount Vernon, Washington, which is about sixty miles from the Canadian border. One package was addressed to Van Nuys, California, and the other to Nashville, Tennessee. Each package was sent registered mail and declared to contain coins valued at $10,000.

As the respondent was leaving the post office, the clerk told Captain Belgard of the Mount Vernon police, who happened to be present, that he was suspicious of the packages. Captain Belgard noticed that respondent's car had British Columbia license plates and that the return address on the packages was a vacant housing area of a neighboring junior college. Captain Belgard called the Canadian Police who in turn called R. J. O'Hearn, Customs Officer-in-Charge at Seattle, Washington. At about 3:00 p.m., O'Hearn telephoned the Customs office in Van Nuys and learned that the

addressee of one of the packages was under investigation by that office for trafficking in illegal coins. Due to the difference in time, O'Hearn could not then reach the customs office in Nashville, Tennessee, the destination of the other package. When he telephoned that office the following morning, he learned that the addressee of the second package was also suspected of trafficking in gold coins. O'Hearn then filed an affidavit for a search warrant with the United States Commissioner in Seattle. At 3:00 p.m., the search warrant was issued at Seattle and at 6:30 p.m. it was served at the post office at Mount Vernon.[1] When the packages were opened, they were found to contain gold coins.

Other evidence at the trial showed that the respondent crossed into the United States from Canada with the two packages in his possession without declaring them to customs officials.

The court of appeals concluded that the period between the time that the packages were mailed and the time that the warrant was executed, a period of 29 hours, was "unreasonably long" and that detention of the packages for such a period of time without judicial authorization violated the Fourth Amendment. It reasoned that Inspector O'Hearn should have applied for a search warrant once he learned that the Van Nuys addressee was under investigation for trafficking in gold coins. The court reached its conclusion despite the fact that it found that Inspector O'Hearn's deci-

[1] Mount Vernon is located approximately sixty miles north of Seattle.

sion to wait to check the destination of the Nashville package was "an understandable exercise of caution" (App. A, *infra*).

REASONS FOR GRANTING THE WRIT

In *Chimel* v. *California*, No. 770, O.T., 1968, decided June 23, 1969, this Court recently reemphasized the need for law enforcement officers to obtain a judicial warrant before conducting a search. This case presents an important question as to what actions law enforcement officers may take to preserve the status quo during the time needed to conclude their investigation and to obtain a search warrant.

Despite the fact that the agents here secured a search warrant, the court below held that, in the absence of a warrant, the post office had no right to detain the packages until the investigation was completed and the warrant was obtained. Although the court found that the officials acted with understandable caution, it nevertheless felt compelled to hold that the detention was unreasonable under the Fourth Amendment. At least one of the judges, and perhaps the entire panel, concluded that decisions of this Court required this result, even though it was at odds with a reasonable appraisal of the action taken. Thus, the post office agents are condemned, not for acting precipitously, but for acting cautiously.

Here the seizure was made with a warrant, and the court below did not question the adequacy of the affidavit on which the warrant was obtained. The only question arises because of the actions taken to preserve the status quo while that warrant was obtained—actions which

were taken promptly and carefully in the light of all the circumstances.

This Court has never expressly formulated principles governing the rights of law enforcement officers to detain property or otherwise to preserve the status quo for a short time pending an application for a search warrant. It did, in *Terry* v. *Ohio,* 392 U.S. 1, uphold a brief detention of a person without a warrant. And in *Preston* v. *United States,* 376 U.S. 364, the Court implied that law enforcement officials could, subsequent to an arrest, detain an automobile pending an application for a search warrant. If an automobile can be detained for a limited period without the consent of the owner, it would follow that a package placed in the custody of the post office could be detained for a reasonable period while government officials decide whether they may justifiably apply for a warrant to examine its contents. In our view the court below has misconstrued *Katz* v. *United States,* 389 U.S. 347; *Davis* v. *Mississippi,* No. 645, O.T., 1968, decided April 22, 1969; and *Camara* v. *Municipal Court,* 387 U.S. 523, the cases upon which it relied, in holding that these decisions require that a search be found invalid even though it is made pursuant to a warrant obtained from a magistrate, simply because there has been a limited detention needed to check facts so that a proper warrant could be obtained.[2]

[2] The problem of detaining letters in order to record the information on the outside of envelopes, the so called "mail watch" (see, *e.g.*, *Lustiger* v. *United States,* 386 F. 2d 132, 139), is significantly different from detaining packages containing matter not protected by the First Amendment.

The question of the right to detain, or otherwise to preserve the status quo, pending application for a warrant is of great significance to law enforcement. There are many situations in which law enforcement officers find it necessary to preserve the status quo for a period of time pending further investigation and an application for a warrant. For example, suspicious circumstances may justify the brief detention of an automobile so that a check of its ownership may be made. Moreover, in light of *Chimel,* there may be circumstances where, in order to prevent a third person from destroying or concealing evidence after an arrest has been made on the premises, law enforcement officials will find it necessary to control egress from a dwelling during the period of time necessary to get a search warrant. If the government's right to detain property when placed in its custody is as restricted as the court below found here, then it would follow that the government's right to hold or control property against the will of its owner or possessor would likewise be limited. The decision below thus raises an issue of fundamental importance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
WILL WILSON,
Assistant Attorney General.
BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

JULY 1969.

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 23449

UNITED STATES OF AMERICA, APPELLEE

vs.

GERRITT JOHANNES VAN LEEUWEN, APPELLANT

(May 29, 1969)

On Appeal from the United States District Court for the Western District of Washington, Northern Division

Before: CHAMBERS and KOELSCH, *Circuit Judges*, and *SOLOMON, *District Judge*

SOLOMON, *District Judge:*

Gerritt Johannes Van Leeuwen was convicted of illegally importing gold coins into the United States in violation of 18 U.S.C. § 545. He claims the post office violated the Fourth Amendment when it detained two first class packages without a warrant. He also claims an affidavit in support of a search warrant was insufficient. We reverse on the basis of Appellant's first claim.

On March 28, 1968, at about 1:30 P.M., Appellant mailed two twelve-pound packages at the post office in Mount Vernon, Washington. He sent both pack-

*Honorable Gus J. Solomon, United States District Judge, District of Oregon, sitting by designation.

ages by first class mail and insured each for $10,000. Appellant told the postal clerk that the packages contained coins. As appellant was leaving the post office, the clerk told Captain Belgard of the Mount Vernon police that he was suspicious of the packages. Captain Belgard noticed that Appellant's car had British Columbia license plates and that the return address on the packages was a vacant housing area of a neighboring junior college.

Captain Belgard called Sergeant McKenzie of the Canadian police, who, in turn, called R. J. O'Hearn, Customs Officer-in-charge at Seattle, Washington. At about 3:00 P.M. O'Hearn called the Customs office in Van Nuys, California, the destination of one of the packages. He learned that the addressee was under investigation for trafficking in illegal coins. O'Hearn could not reach the Customs office at Nashville, Tennessee, the destination of the other package, because of the time difference. When he called the next morning, he learned that the addressee of the second package was also suspected of trafficking in gold coins. O'Hearn secured a search warrant and opened the packages at 6:30 P.M. on March 29. The Mount Vernon post office detained the packages for 29 hours, between the time they were mailed and the execution of the warrant. No judicial officer authorized this detention.

First class mail is protected by the Fourth Amendment. *Ex Parte Jackson,* 96 U.S. 727 (1878). *Oliver* v. *United States,* 239 F. 2d 818 (8th Cir. 1957). In *Lustiger* v. *United States,* 386 F. 2d 132 (9th Cir. 1967), the Court said:

> "The protection against unreasonable search and seizure of one's papers or other effects, guaranteed by the Fourth Amendment extends to their presence in the mails * * *. Thus, first class mail *cannot be seized and retained,* nor

> opened and searched, without the authority of a search warrant." 386 F. 2d 139. (Emphasis added.)

The Fourth Amendment protects "the right of the people to be secure * * * in their papers and effects, against unreasonable searches and seizures." The information known to Captain Belgard immediately after Appellant mailed the packages would reasonably have justified a brief detention, without a warrant, while a further investigation could be made. *Terry* v. *Ohio,* 392 U.S. 1, 20–21 (1968); *cf. Warden* v. *Hayden,* 387 U.S. 294 (1967).

By 3:00 P.M., O'Hearn knew that the addressee of one of the packages was under investigation for trafficking in gold coins. This additional fact supplied probable cause to search the packages. Instead, O'Hearn decided to wait until the following day so he could call the customs office at the destination of the second package. This decision represents an understandable exercise of caution. Nevertheless, as a result of this delay, the packages were detained for 29 hours at the post office. This period was unreasonably long, and the officers should have obtained a warrant authorizing the detention. *Katz* v. *United States,* 389 U.S. 347 (1967); *Lustiger* v. *United States, supra*; *see Davis* v. *Mississippi,* * * * U.S. * * *, 37 USLW 4359 (1969); *Camara* v. *Municipal Court,* 387 U.S. 523 (1967).

In *Katz,* the Government urged the Court to "retroactively validate" the conduct of its agents who had eavesdropped on the defendant's telephone conversations. The Government argued that the agents "did no more than they might properly have done with prior judicial sanction." 389 U.S. at 356. The Court rejected this argument:

> "It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer * * *. Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' * * * for the Constitution requires 'that the deliberate, impartial judgment of a judicial officer * * * be interposed between the citizen and the police * * *.'" 389 U.S. at 356–57.

In the present case, the length of time that the packages were retained by the post office made prior judicial authorization necessary.

The Government cites *United States* v. *Beckley,* 335 F. 2d 86 (6th Cir. 1964). There, the package involved was mailed from outside the country and was not in first class mail.

The Government also claims that Appellant has no standing to object to the seizure because he was not the addressee or the return addressee of the packages. There is no merit to this contention. *Jones* v. *United States,* 362 U.S. 257 (1960).

The seizure of Appellant's packages violated his rights under the Fourth Amendment and the gold coins should not have been admitted in evidence. *Weeks* v. *United States,* 232 U.S. 383 (1914).

Reversed.

CHAMBERS, *Circuit Judge,* concurring:

I think I am as sensitive as anyone to the Fourth Amendment in protecting one's person and one's home. But the detention of Van Leeuwen's "hot money" at the post office for 29 hours does not offend me very much. Someone in the post office holds up much of my mail over 29 hours.

I concur in the reversal only because I think precedent, which we must follow, requires us to reverse.

APPENDIX B

JUDGMENT

United States Court of Appeals for the Ninth Circuit

No. 23449

UNITED STATES OF AMERICA, APPELLEE

vs.

GERRITT JOHANNES VAN LEEUWEN, APPELLANT

Appeal from the United States District Court for the Western District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington, Northern Division and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is reversed.

Filed and entered May 29, 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 403

UNITED STATES OF AMERICA, PETITIONER

v.

GERRITT JOHANNES VAN LEEUWEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 23–26) is reported at 414 F. 2d 758.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1969 (A. 27). On June 26, 1969, Mr. Justice Marshall extended the time for filing a petition for a writ of certiorari to and including July 28, 1969. The petition was filed on July 28, 1969, and was granted on October 27, 1969 (A. 28). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Fourth Amendment is violated when post office officials detain packages believed to contain

illegal matter for the short period of time needed to investigate available sources of information and apply for a search warrant.

STATEMENT

After a jury trial in the United States District Court for the Western District of Washington, respondent was convicted of illegally importing gold coins from Canada, in violation of 18 U.S.C. 545. He was sentenced to three years' imprisonment and fined $1,500 (A. 22).

The relevant facts are undisputed. At about 1:30 p.m. on Thursday, March 28, 1968, respondent deposited for mailing two twelve-pound packages at the post office in Mount Vernon, Washington, which is situated about sixty miles from the Canadian border. One package was addressed to a post office box at Van Nuys, California, and the other to a post office box at Nashville, Tennessee; both bore a return address in a nearby village. Respondent paid airmail registered postage for each package, and insured each one for $10,000, declaring that they contained coins or a coin collection (A. 18–19; G. Ex. 3).[1]

As respondent was leaving the post office, the postal clerk told Captain Belgard of the Mount Vernon po-

[1] The packages were designated as air mail, and postage was paid at the air mail rate, which is the rate prescribed for first class mailing of packages of that weight (see 39 C.F.R. 131.1, 136.1–136.2). Both parties have agreed throughout these proceedings that in the circumstances, particularly respondent's registering the packages, the postal officials properly regarded the packages as first class mail, not subject to discretionary inspection (see A. 18, 23; cf. *Santana* v. *United States*, 329 F. 2d 854, 856 (C.A. 1), certiorari denied, 377 U.S. 990).

lice, who happened to be present, that he was suspicious of the packages. Captain Belgard noticed that respondent's car had British Columbia license plates and that the return address on the packages was a vacant housing area of a nearby junior college. Captain Belgard called the Canadian Police, who in turn called R. J. O'Hearn, Customs Officer-in-Charge at Seattle, Washington (A. 19; Tr. 16–18, 21).

At about 3:00 p.m. that afternoon, O'Hearn telephoned the customs office in Van Nuys and learned that the addressee of one of the packages was under investigation by that office for trafficking in illegal coins. Because of the time differential, O'Hearn could not reach the customs office in Nashville, Tennessee, the destination of the other package, on the same afternoon. He telephoned that office the following morning and learned that the addressee of the second package was also being investigated for trafficking in gold coins (A. 15–16; Tr. 40–41).[2] O'Hearn then filed an affidavit for a search warrant for both packages with the United States Commissioner in Seattle (A. 5–6). At 4:00 p.m. that afternoon, the search warrant was issued at Seattle, and at 6:30 p.m. it was executed at the post office at Mount Vernon, approximately sixty miles from Seattle (A. 7–9; Tr. 48). When the packages were opened, they were found to contain several hundred gold coins (A. 9; Tr. 41–43). Thereafter, the packages were resealed and forwarded to the addressees, each of whom refused to accept the

[2] About 1:30 p.m. on March 29, 1969, respondent admitted to the Canadian police that he mailed two parcels at Mount Vernon after he had brought them into the United States (Tr. 32).

package (Tr. 12, 44). Both packages were returned to Mount Vernon within a few days (Tr. 12; Ex. 3).

Other evidence at the trial showed that respondent entered the United States from Canada with the two packages in his possession without declaring them to customs officials (Tr. 31–33, 67–68, 71–75).

The court of appeals reversed the conviction. It held that the coins were improperly admitted in evidence on the ground that the delay between the time that the packages were deposited at the post office and the time that the warrant was executed, a period of 29 hours, was "unreasonably long" and that detention of the packages for that period without judicial authorization violated the Fourth Amendment (A. 23–26). It reasoned that Inspector O'Hearn should have applied for a search warrant once he learned that the Van Nuys addressee was under investigation for trafficking in gold coins. The court concluded that he delayed too long, notwithstanding its observation that his decision to make an inquiry with respect to the Nashville addressee as well as the Van Nuys addressee was "an understandable exercise of caution" (A. 25).

ARGUMENT

I. INTRODUCTION AND SUMMARY

This Court has frequently emphasized that, except in certain narrowly defined classes of cases, the Fourth Amendment requires law enforcement officials to secure a warrant to search private property. *E.g., Chimel* v. *California,* 395 U.S. 752; *Johnson* v. *United States,* 333 U.S. 10. Federal customs and postal officials followed that command in this case. They con-

ducted an overnight investigation in order to confirm the suspicions created by the circumstances of respondent's mailing of the two packages. The next day, they presented the results of the investigation to a United States Commissioner, who issued a warrant to search the packages. That afternoon, the customs agents searched the packages pursuant to the warrant and discovered a substantial quantity of gold coins which had been illegally imported. The court of appeals implicitly found that the warrant was properly issued on sufficient facts to justify a search; nor did it question the government's right to seize and retain the coins which the search uncovered. It held, however, that the coins were inadmissible at trial because the time during which the unopened packages were detained at the post office was "unreasonably long, and the officers should have obtained a warrant authorizing the detention" (A. 25).

Even if, contrary to our submission here, the detention of the packages prior to the issuance of the warrant had violated the Fourth Amendment, the propriety of the court's application of the exclusionary rule would not be free from doubt. The fact that an individual has been subjected to a period of unlawful detention does not entitle him to release if subsequently a court or grand jury finds probable cause to hold him for further stages in the criminal process; that the individual was unlawfully held prior to the finding of probable cause does not affect the validity of that finding or its adequacy as a justification for continued detention. There is no reason to take a different view of this case where the customs agents' dis-

covery and seizure of the coins was justified by the warrant, issued on the basis of an ample showing of probable cause.

To be sure, tangible or verbal evidence secured from the individual as a "direct result" of an unlawful detention may not be admitted at trial, see *Wong Sun* v. *United States,* 371 U.S. 471, 485–486. But there is no relationship whatever in this case between the detention of the packages and the investigation which produced the facts to justify the warrant. That investigation would have been conducted the same way, with the same result, irrespective of whether the packages had been detained or forwarded to their destinations and the search warrants issued in those districts; the detention in no way aided the investigation.[3] The policies which underlie the exclusionary rule do not, in our view, require the suppression of evidence which was seized pursuant to a valid warrant merely because the facts justifying the issuance of the warrant were obtained while the property was unlawfully detained.

Although we would accordingly contend that the evidence in this case was properly admitted in all events, we believe that the fundamental error in the decision below is the court's conclusion that the detention of the packages prior to the issuance of the warrant was "unreasonably long". This holding of the court of appeals involves an issue of basic im-

[3] Accordingly, the present case is materially distinguishable from *Davis* v. *Mississippi,* 394 U.S. 721, on which the court of appeals relied. The arrest and detention of the petitioner in that case, which the Court held to be unlawful, was an indispensible condition of obtaining his fingerprints.

portance in law enforcement—the authority of officers to exercise some control over suspected property for a reasonable time needed to ascertain relevant facts and apply for a search warrant. As we show presently, this authority is part of the essential balance underlying the preference to be accorded to warrants, for the right to maintain the status quo assures the officers, and the public, that the property will not have been removed or destroyed by the time the officers secure a warrant. Here, the court of appeals found that the detention of the packages throughout the afternoon on which they were mailed was justified and that, by that time, the agents had obtained enough information to authorize a search. Yet, by delaying the application for a warrant until one final inquiry could be made on the following morning, the court held that the agents had detained the packages unreasonably. In these circumstances, however, we submit that the court below erroneously read the Fourth Amendment to prohibit governmental conduct which is entirely consistent with the practice of prior judicial authorization for searches which the Amendment contemplates.

II. THE DETENTION OF RESPONDENT'S PACKAGES FOR A REASONABLE TIME NEEDED TO MAKE A LIMITED INVESTIGATION AND APPLY FOR A SEARCH WARRANT DID NOT VIOLATE THE FOURTH AMENDMENT

1. This Court's opinions lend support to the proposition that the Fourth Amendment allows law enforcement officers to take limited action, reasonable under the circumstances, to prevent the removal or

destruction of suspected property pending the issuance of a search warrant. In response to arguments that the necessities of a situation required an immediate search without a warrant, the Court has offered as an alternative that the property could have been guarded during the time needed to obtain a warrant. Thus in *Taylor* v. *United States*, 286 U.S. 1, 6, the Court pointed out that a "short period of watching" during the time required to secure a search warrant could have prevented the possibility of any change in premises from which government agents had smelled the odor of whiskey. In *Trupiano* v. *United States*, 334 U.S. 699, 706, the Court, in condemning a warrantless search of an illegal distillery, noted that a warrant could have been obtained without any risk of removal of the suspected property since one of the agents "was on hand at all times to report and guard against such a move." See also *Chapman* v. *United States*, 365 U.S. 610, 614; *Davis* v. *United States*, 328 U.S. 582, 615 (dissenting opinion of Mr. Justice Frankfurter); *United States* v. *Jeffers*, 342 U.S. 48, 52; *United States* v. *Kaplan*, 89 F. 2d 869, 871 (C.A. 2) (L. Hand, J.); *Corngold* v. *United States*, 367 F. 2d 1, 3–8 (C.A. 9).

The necessary corollary of these statements is that the agent is authorized not only to watch but to guard—to prevent others from removing the property or, where appropriate, to take it into his custody. This authority serves to encourage respect for privacy as well as to satisfy the requirements of effective law enforcement. By avoiding the possibility that the warrant process will be an empty ceremony because

the property will have been removed or destroyed, this limited authority to ensure that the property will be amenable to search under warrant encourages the agent to submit his justification for the search to a neutral magistrate. It protects privacy by encouraging the postponement of a search in favor of a more limited interference with personal property in situations where a warrantless search might be justified because the property otherwise would be in danger of destruction or concealment. And in light of *Chimel* v. *California*, 395 U.S. 752, restricting the scope of a search incident to an arrest, there will be many more occasions where the guarding or detention of property is compelled by the circumstances.

In taking action to prevent the removal or destruction of suspected property until a search warrant is obtained, the agents unavoidably interfere, overtly or implicitly, with the rights of private individuals in the property. The government's action, whether or not denominated a "seizure" of the property, is of course subject to the limitations of the Fourth Amendment.[4] But it does not follow, as the court of appeals apparently believed, that a warrant is necessary to validate not only the search itself, but also the interim detention of the property; the Fourth Amendment does not compel the creation of a novel procedure to warrant such detention. The Fourth Amendment's command of reasonable governmental action has al-

[4] See *Terry* v. *Ohio*, 392 U.S. 1, 19; see also 39 U.S.C. 4057, which prohibits the *opening* of first class mail except pursuant to a search warrant. Respondent, in his brief in opposition, cited no statute or regulation, and we can find none, which deals with the detention of packages in the present circumstances.

ways been held to permit search and seizure without a warrant where exigent circumstances justify the failure to obtain prior judicial approval. See, *e.g.*, *Warden* v. *Hayden*, 387 U.S. 294, 298–299. Searches of automobiles and arrests and incidental searches of persons are well established instances where action without a warrant is permissible in light of the impracticability of securing a warrant. See *Carroll* v. *United States*, 267 U.S. 132; *McCray* v. *Illinois*, 386 U.S. 300; *Draper* v. *United States*, 358 U.S. 307; cf. *Ewing* v. *Mytinger*, 339 U.S. 594. And recently in *Terry* v. *Ohio*, 392 U.S. 1, the Court upheld, against a Fourth Amendment contention, limited on-the-street detention and search of persons, without a warrant, where the facts known to the officer justified a further investigation but were not sufficient to establish probable cause for an immediate arrest.

The need to guard or detain private property pending the issuance of a search warrant will arise where the officers encounter such property unexpectedly. Where the circumstances unmistakably establish probable cause to search the property, it is hardly to be doubted that the officer acts reasonably by detaining the property, without search, during the time required to prepare an affidavit and a warrant and to obtain a magistrate's disposition on the application. Frequently, however, the facts known to the officer, although strongly suggestive of criminality, do not justify the belief that a warrant should issue, but plainly call for a further investigation of readily ascertainable facts. In this situation, also, we believe that detention of the property, without a warrant, is

reasonable in order to permit the officer to make relevant inquiries, calculated to lead promptly to an accurate determination whether a search is justified. Without such limited authority, the careful officer who defers the decision to make an intrusive search until all available information is considered is likely to find his investigation frustrated by a removal or destruction of the property, if it is in fact connected with crime. Here, as in *Terry* v. *Ohio,* where there is much tension in the balance between the preservation of privacy and the apprehension of crime, it is appropriate to allow some limited power to the officer to preserve the status quo until a more accurate decision can be made.

As in the case of other actions which interfere with either personal or property rights, the conduct of law enforcement officials must be reasonable under the circumstances. The interference "must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible". In assessing its legality under the Fourth Amendment, the "inquiry is a dual one—whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry* v. *Ohio, supra,* 392 U.S. at 19–20.

2. The facts of the present case illustrate the type of situation where suspicious circumstances and the availability of prompt means of obtaining needed details justify a detention of suspected property to determine whether a search warrant should be sought. Even the court below acknowledged that the facts

known to the officers shortly after respondent deposited the packages at the post office "would reasonably have justified a brief detention, without a warrant, while a further investigation could be made" (A. 24).

Immediately after respondent left the packages for mailing, post office officials learned that the return address given on the packages was an uninhabited housing area in a nearby junior college. It is unusual, to say the least, for a person to give a fictitious address on packages which he insures for $20,000. The fact that respondent's automobile bore British Columbia license plates was further indication that he was not a resident of the community and gave rise to the suspicion that the packages may have contained coins that had been brought into the United States from Canada. In these circumstances, the postal officials had reason to suspect that the packages were connected with some illegal activity, and they were justified in declining to allow the mails to be used to carry out that scheme without some further investigation, cf. *Perr* v. *United States,* 363 U.S. 370, 389; to have done otherwise "would have been poor police work indeed" (*Terry* v. *Ohio, supra,* 392 U.S. at 23).

There were sound reasons in this case, moreover, for detaining the packages at the Mount Vernon post office rather than forwarding them through the mail while the investigation was conducted. The offense in respect of which the investigation was made involved the unlawful importation and concealment of gold coins, which took place in the Western District of

Washington; it would have been unwise to send the packages out of the district, with possible risk of loss or destruction of evidence, without their ever having been opened. Forwarding the packages through the mails also would have required two search warrants rather than one, involving the services of several United States Attorneys Offices and Customs Offices, and two magistrates, all of whom would be completely unfamiliar with local conditions in the district where all the information in support of the applications was gathered. Finally, once the investigation had been completed, it would have required additional time and manpower to locate the packages en route and to obtain the cooperation of the nearest federal offices to process the warrant applications. In light of the fact that respondent's identity was not known and that the focus of the investigation was the readily available information about the addressees of the packages, the agents reasonably declined to risk the substantial delays which would have resulted from forwarding the packages.

III. THE PERIOD DURING WHICH THE PACKAGES WERE DETAINED WAS NOT UNREASONABLE

The error which the court of appeals found in the government's conduct in this case was that the Customs Officer-in-charge did not apply for a warrant on the afternoon of March 28, the day when the packages were deposited at the post office, but rather waited until the following day so that he could determine whether there was any information concerning

the Nashville addressee.[5] Although the court of appeals thought that the officer had shown an "understandable exercise of caution", it held that the resulting delay until a search warrant was issued and executed was "unreasonably long" (A. 25). We submit, however, that the officer's exercise of caution is more consistent with the policy of the Fourth Amendment than the alternative of an immediate warrant application which the court of appeals suggested.

The decision of the court of appeals rested at least in part on its determination that the officers had probable cause to search the packages on the afternoon of March 28. Yet we are unable to understand how that determination can lead to the conclusion that it was unreasonable to delay overnight so that additional information could be secured. If it has any bearing on the question here, the fact that the officers already had probable cause to search supports the reasonableness of their conduct, because it eliminates the risk that the packages were being held without likelihood that a warrant would be issued.

Moreover, it is doubtful whether the protection afforded by the Fourth Amendment is advanced by judicial decisions which penalize the government for acting too slowly rather than too precipitously. In at least some cases in which property is detained, investigation of all readily available sources will disclose information which provides a satisfactory explanation for the suspicious circumstances which

[5] It was impossible to make this inquiry on March 28 because of the difference in time between the Pacific and the Central time zones.

prompted the investigation. Full investigation, consistent with the obligation to act with all practicable dispatch, should be encouraged since it reduces the risk that warrants will be sought and issued improvidently.

In addition, there are practical reasons why some flexibility must be accorded to law enforcement officers in appraising the sufficiency of their own investigation. As cases in this Court demonstrate (see, *e.g.*, *Spinelli* v. *United States*, 393 U.S. 410), it is not easy to determine whether particular facts establish the existence of probable cause as a matter of law. No matter how confident the officer is in his conclusion, it is necessary to persuade a magistrate to make an independent finding of probable cause, and, of equal practical importance, to have this done on a basis which will thereafter be sustained by the courts. Even if the customs officer should have concluded, as the court of appeals reasoned, that he had probable cause to believe that a crime had been committed once he learned that the Van Nuys addressee was under investigation for trafficking in gold coins, he reasonably could be concerned that a magistrate might think that the investigation of one addressee was not enough to justify opening one package, much less both. Obviously, additional information that *both* addressees were under surveillance for dealing in illegal coins would, and did, add significantly to the weight of the probable cause as to both packages.

Not only was that inquiry reasonably thought to be necessary by the customs officers, but, on the other side, the interference with privacy from the overnight

delay was slight. Respondent had declared, truthfully, that the packages contained coins. Although we do not believe that in equivalent circumstances the delay here would be unreasonable even as to written matter, the fact is that in this case there is not the slightest suggestion of a First Amendment problem. Nor was this a situation where perishable property might be damaged by delay in delivery. The significant Fourth Amendment interest was not whether the packages were forwarded to their destinations on the day they were deposited rather than the next day, but the *privacy* of the packages. This privacy was not disturbed until the approval of the magistrate was obtained. It was, therefore, reasonable for the officials to delay the packages the short time needed to obtain the information available as to both addressees.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 403

UNITED STATES OF AMERICA,

Petitioner,

vs.

GERRITT JOHANNES VAN LEEUWEN.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 403

UNITED STATES OF AMERICA,

Petitioner,

vs.

GERRITT JOHANNES VAN LEEUWEN.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

Questions Presented

I.

Whether the Fourth Amendment is violated when post-office and/or customs officials knowingly detain registered, first-class packages for the unreasonable period of at least twenty-nine hours and at least twenty-four hours after said officials were in possession of information sufficient to enable them to obtain a Search Warrant to open the packages and discover whether they contained illegal matter.

II.

Whether FRCP 41 (e) is violated when a Search Warrant is granted solely on an Affidavit which alleges five facts, four of them being based on hearsay evidence compounded on top of hearsay evidence.

Statement

The relevant facts are undisputed. They are set forth below in two sections; the first section sets forth the facts known to officials prior to the crucial time and date of 2:35 p.m. on Thursday, March 28, 1968, and the second section sets forth the few additional facts learned after that time and date.

Between 1:30 p.m. and 2:35 p.m. on Thursday, March 28, 1968, postoffice, police and customs officials became aware of the following facts (Tr. 16, 28, 39-40, 47-48; A. 15-16, 19):

1) That Appellee, Gerritt Johannes Van Leeuwen, deposited for first-class mailing at the postoffice in Mount Vernon, Washington, two packages; declared that each contained coins, and insured each package for $10,000 on which proper postage and rates were paid (Tr. 2, 6, 7, 11, 14, 90; A. 15, 19).

2) That one package weighed approximately nine pounds and the other eleven pounds (Tr. 21).

3) That the postal clerk, Mr. Thomson, had insisted that the packages be sealed like a letter before he would accept them as the corners were completely unsealed (Tr. 10).

4) That the suspicions of the Post Office window clerk, Gerald D. Thomson, were aroused because of the amount of

money involved in the transaction and the rarity of its occurrence, and he notified, and delivered possession of the two packages to, the Captain of the Mount Vernon Police Department, the assistant postmaster, and a member of the local fire department (Tr. 2, 3, 16, 20).

5) That additional suspicions of Charles Belgard, Captain of the Mount Vernon Police Department, who coincidentally happened to be in the Post Office at the time of mailing, were aroused because of his recognition of the falsity of the return addresses listed on each of the two packages (Tr. 17-18).

6) That the return address on each package was the same and, although a proper address, it was fake in that each referred to the addressor, or sender, as one G. J. Williams of No. 8, Campus Village, Mount Vernon, Washington, which is a private student dormitory, when, in fact, no G. J. Williams had been "anywhere within that Campus Village" and that the last time No. 8 Campus Village had been occupied was "two months prior to March 28" (Tr. 6, 7, 17, 18, 21, 25; A. 6, 18, 19).

7) That Captain Belgard advised the postal window clerk, Mr. Thomson, to accept the packages and contact his superiors about them (Tr. 18, 26).

8) That the person or persons mailing the packages were observed to leave the Post Office in a car with Canadian license plates by Captain Charles A. Belgard, a skilled observer, who copied down the license plate number (Tr. 18, 39-40; A. 6, 15).

9) That Captain Charles Belgard telephoned Sergeant James E. McKenzie, Royal Canadian Mounted Police,

Canada, concerning the mailing of the two packages (Tr. 28).

10) That Sergeant McKenzie conducted two routine inquiries as a result of Captain Belgard's telephone call, and then, before 2:30 p.m., telephoned Mr. Raphael J. O'Hearn, United States Customs Agent in charge at Seattle (Tr. 28, 40).

11) That United States Customs Agent O'Hearn, at about 2:30 p.m. and "immediately after receiving this information" from Sergeant McKenzie, "called the United States Customs Agency Office in Los Angeles which has Van Nuys, California in its area . . ." (Tr. 40-41), and thereafter contacted the Postal Inspector and assistant postmaster in Mount Vernon, telling them that "we had reason to believe that they (the packages) were deposited in violation of law" (Tr. 41; A. 16).

12) That one of the two addressees, namely Harry Gordon, P.O. Box 2133, Van Nuys, California, was "a known dealer in the illegal traffic of gold coins" as revealed by U.S. Customs Agents in Los Angeles. The other addressee, namely Davis Carr, P.O. Box 7646, Nashville, Tennessee, was not checked by O'Hearn on March 28, 1968 (Tr. 5, 39-40, 51; A. 5, 16).

13) That by not later than 2:35 p.m. (Pacific Standard Time) on March 28, 1968, United States Custom Official O'Hearn had all of the above information and that the Eastern Standard Time was then not later than 5:35 p.m. (Tr. 39-52).

14) That the record contains nothing indicating that any Post Office Official, United States Customs Official, or any

other official, made any attempt at any time after 2:35 p.m. (Pacific Standard Time), 5:35 p.m. (Eastern Standard Time), to check the authenticity of the addressee in Nashville, Tennessee listed on the second of the two packages.

On the next day, Friday, March 29, 1968, Customs Officials gathered the following two additional facts:

1) That from a morning telephone call (A. 16) to the Customs Agent in charge at Mobile, Alabama (which has jurisdiction over Nashville, Tennessee), United States Customs Official O'Hearn learned that the second addressee, namely Davis Carr, P.O. Box 7646, Nashville, Tennessee, was also one of the "known dealers in illegal traffic of gold coins" (Tr. 5, 39-40; A. 5, 16).

2) That at 1:30 p.m. the Appellee admitted having taken two parcels to Mount Vernon, Washington to Corporal Charles J. Crosson of the Royal Canadian Mounted Police (Tr. 30-32, 36).

A daytime Search Warrant was applied for and issued between 3 and 4 p.m. Friday, March 29, 1968 and served on postal officials at 6:30 p.m. The two packages were opened and discovered to contain gold coins more than twenty-four hours after customs learned of the presence

of the coins at the post office in Mount Vernon (Tr. 48, 53, 54, 59-60; Ex. 4 Tr. 61; Tr. 64; A. 7, 9, 18, 19).

The Appellee was convicted after a jury trial in the United States District Court for the Western District of Washington for violating 18 U.S.C. § 545 and sentenced to three years in prison and fined $1,500 (A. 22). This decision was reversed by the Court of Appeals. 414 F.2d 758 (A. 23).

Summary of Argument

United States Officials had all the evidence they needed at 2:35 p.m. (Pacific Standard Time) on March 28, 1968, to obtain a Search Warrant to open the two packages, and under the applicable decisions of this Court the United States Officials were immediately obligated to secure such a Warrant. Instead, they detained the two packages for an unreasonable length of time, without making overnight investigations, and in violation of the Fourth Amendment of the Constitution of the United States.

This Court has emphasized and re-emphasized that, with few narrowly defined exceptions not here relevant, the Fourth Amendment requires law enforcement officials to secure a Warrant before conducting a search of private property. E.g., *Chimel* v. *California,* 395 U.S. 752 (1969). United States Customs and Postal Officials have failed to follow the commands of the Court in this case. Furthermore, in an early decision, *Ex Parte Jackson,* 96 U.S. 727 (1878), this Court stated that sealed packages delivered through the mails are as secure by the provisions of the Fourth Amendment from prying into their contents as are the papers and effects in our own homes. As a result law en-

forcement officials must obtain a Search Warrant before searching and seizing first-class mail. Cf. *Oliver* v. *United States,* 239 F.2d 819 (8th Cir. 1957), *Lustiger* v. *United States,* 386 F.2d 132 (9th Cir. 1967). Federal Customs and Postal Officials did obtain a Search Warrant in this case but only after having unreasonably detained the packages without a Warrant. This is in accordance with this Court's requirements set forth in *Terry* v. *Ohio,* 392 U.S. 1, 20-21 (1968); cf. *Warden* v. *Hayden,* 387 U.S. 294 (1967).

The packages were mailed at approximately 1:30 p.m. and by 2:35 p.m. Customs Officer O'Hearn "knew that the addressee of one of the packages was under investigation for trafficking in gold coins". The Court of Appeals held that this additional fact, if additional facts be needed, supplied probable cause to search the packages (A. 24-25). A Search Warrant could have issued at this time, and it would have given customs officials ample time to properly seize the contents of the packages without violating the Fourth Amendment. However, it should be noted that they did not obtain a Search Warrant until more than twenty-four hours later (4 p.m. (Pacific Standard Time) on March 29, 1968, but they had probable cause at 2:35 p.m. on the day preceding) and it was not served until 6:30 p.m. on postal officials holding the packages. (See statement.)

Because of the delay in issuing the Warrant the Court of Appeals held that the period during which the packages were detained, twenty-nine hours, "was unreasonably long, and the officers should have obtained a Warrant authorizing the detention. *Katz* v. *United States,* 389 U.S. 347 (1967); *Lustiger* v. *United States, supra;* see *Davis* v. *Mississippi,* 394 U.S. 721 (1969); *Camara* v. *Municipal Court,* 387 U.S. 523 (1967)."

Further, the detention of the packages for an unreasonable time is a violation of statutory and regulatory law as promulgated by Congress to protect first-class mail. (See appendix to this Brief.) The government would have us believe that in no way were the Appellee's rights violated as the investigation would have been conducted the same way even if the packages had been forwarded to their destinations and Search Warrants issued there. However, they have failed to give us any citation in this respect nor have they shown how this is possible. All the information obtained was given in violation of the Postal Code.

Further, the Court below did not reach the claim that the Affidavit in support of the Search Warrant was insufficient as it reversed "on the basis of Appellant's first claim" (A. 23). It is respectfully submitted that had this issue been reached, a finding would have been made that the Warrant was not issued as a result of personal knowledge of Customs Officer O'Hearn, nor did it give pertinent source information; it does not contain his statement as to creditability of the source material or its reliability and as a result the Search Warrant should not have been issued and, having been issued, its fruits should have been suppressed and returned to the Appellee.

Last but not least, it is respectfully submitted that when an individual submits packages to the government postal authorities, the status of these packages is in the form of a trust and, having passed from the individual's control, they should be expeditiously sent on their way to their destination. Postal authorities have accepted the packages in trust and as such, Congress has laid down specific laws or statutes dealing with the status of first-class mail. Violation of these statutes and of the regulations issued

pursuant to the statutes resulted in Appellee's erroneous conviction which was properly overturned by the Court of Appeals and therefore, it is respectfully submitted, that that decision should be upheld, it being consonant with the theories and reasoning as set forth by this Court.

ARGUMENT

I.

The Unreasonable Detention of Respondent's Packages Beyond the Short Time Needed to Make a Limited Investigation and Apply for a Search Warrant Violated the Fourth Amendment.

When deciding this case, this Court must be ever mindful that lurking behind it is the specter of preventive detention. Preventive detention with respect to property, not a human being, but nonetheless, preventive detention under the Fourth Amendment. It is submitted that this Court ought to be wary of approaching preventive detention and keep secure the protections of the Fourth Amendment.

To the average person, the mailing of valuable coins by registering and insuring them through the United States Post Office would seem the safest means of transporting them to their destination. It is common knowledge that vast sums of money, and even so fabulous a gem as the Hope diamond, were and are safely delivered to their destination. This reliance is a function of public trust of our Post Office officials.

Since 1878, first-class mail has been fully protected under the Fourth Amendment, as are sealed packages, *Ex Parte Jackson,* 96 U.S. 727 (1878).

39 U.S.C. § 4251, entitled *"Definition"* states that "(a) First Class Mail consists of mailable . . . (4) matter closed against postal inspection". This is reiterated in 39 C.F.R. § 131.2, *"Classification,"* (a) Description, (1) First-class mail includes: . . . (v) Matter sealed or closed against inspection."

Only a short time is allowed before first-class mail is shipped out. 39 U.S.C. § 710 entitled: *"Making up Mail"* states that "letters brought for mailing to a postoffice half an hour before the time for the next forwarding mail shall be included therein unless, in the opinion of the Postmaster General, more time for making up the mail is required, they may be included in mail to be forwarded not more than one hour thereafter." Therefore, the government may detain mail only until such time as the mail is made up or for the next outgoing shipment.

18 U.S.C. § 1701, *"Obstruction of Mails Generally"* provides against obstruction of the mail, stating that "whoever knowingly and willfully obstructs or retards the passage of the mail . . . shall be fined not more than $100.00 or imprisoned not more than six months, or both."

Additionally, 18 U.S.C. § 1702 entitled *"Obstruction of correspondence"* states that "whoever takes any . . . package . . . which has been in any postoffice . . . before it has been delivered to the person to whom it was directed, with design to . . . pry into the business or secrets of another . . . shall be fined . . . or imprisoned." Yet the facts are that the two packages in this case had been inspected by, and had been delivered into the possession of Captain Charles A. Belgard of the Mount Vernon Police Department and Mr. Peterson of the Mount Vernon Fire Department (Tr. 3, 16, 20).

39 U.S.C. § 4057 entitled *"Opening First Class Mail"* states that "Only an employee opening dead mail by the authority of the Postmaster General, or a person holding a Search Warrant authorized by law may open any . . . parcel of the first-class which is in the custody of the department."

Information pertaining to the physical description of the mail and its outer appearance and writing on the cover may be legally obtained as a result of a mail cover, but 39 C.F.R. § 113.7 emphatically states:

> Authority to order a mail cover is restricted to the Chief Postal Inspector or your Postal Inspector in charge. Upon request of *either* of these officials, furnish them with information regarding the *address, return address* and *postmarks on mail.* When specifically requested by the Chief Postal Inspector or your Inspector *furnish such information to a designated Postal Inspector. Do not give such information to anyone else.* Requests for mail coverage shall be treated confidentially and there shall be strict compliance with the instructions outlined in the request. (Italics ours.)

This Court has previously stated that evidence obtained in violation of the statute or the Fourth Amendment demands suppression in a Federal Prosecution. *Draper* v. *United States,* 358 U.S. 308, 310 (1959) and *Weeks* v. *United States,* 232 U.S. 383 (1914). Similarly this Court has frequently upheld the regulations issued and interpreting the United States Code in such areas as taxation and, it is respectfully submitted, that it should do the same in this case as there has been a flagrant violation of the regulations.

There are no laws of Congress which can place in the hands of officials connected with the postal service any authority to invade the secrecy of sealed packages and "all regulations adopted as to mail matter of this kind must be in subordination to the great principles embodied in the Fourth Amendment of the Constitution." *Ex Parte Jackson*, 96 U.S. 727 at page 733 (1878).

As early as *Commerford* v. *Thompson*, 1 F. 417 (Cir. Ct. Ky. 1880), it was declared that the "act of Defendant in detaining letters was unauthorized as the act declared certain mail unmailable, but provides no machinery for their arrest and detention, probably because no such machinery was possible, *except by resort to the courts, without a violation of the Constitutional guarantee of the right of the people to be secure in their papers against unreasonable search and seizure.*" *Id.* at page 421. (Emphasis added.) Since that time of course regulations have been promulgated providing for the detention of items suspected of being statutorily unmailable.

39 C.F.R. § 124.9 entitled "Opinions on Mailability," states:

> (a) When in doubt as to the mailability of any matter described in §§ 124.2 (harmful matter), 124.3 (intoxicating liquors) and §§ 125.2 (conditions for mailing), 125.3 (perishable matter), and 125.4 (plant quarantines) of this chapter, the Post Master shall submit a sample or a complete statement of the facts to the Classification and Special Services Division, Bureau of Operations, and await instructions.
>
> (b) Postmasters and other employees of Post Offices shall not give opinions to the public concerning the

mailability of matter under §§ 124.4 (obscene and indecent matter), 124.5 (lotteries, frauds and libelous matter), 124.6 (disloyalty and threats to the President), 124.7 (copyright violations), 124.8 (certain foreign communications) and §§ 125.5 (concealable firearms), 125.6 (switchblade knives) of this chapter. When in doubt as to the mailability of any such matter, the Post Master shall withhold it from dispatch or delivery, and shall send a sample or a complete statement of the facts to the Mailability Division, Office of the General Counsel, for instructions. Newspaper (sic) containing doubtful matter should be promptly reported to the Mailability Division, Office of the General Counsel, but they should not be withheld from dispatch without specific instructions. (Captions in parentheses supplied.)

Any of the above would give postal authorities cause to detain a package pending further investigation, but, it is submitted that this case does not fit in any one of the definitions given above. These regulations could have been quite readily checked through the Postal Manual kept by the Post Master.

Since, by the regulations, there is no reason to withhold the dispatch of the mail we must pause and reflect—how did the information regarding the addressees, return address, the size, weight and outward manifestations of the package come to the attention of Customs Officer O'Hearn? As previously noted the postal clerk had allowed the packages to be in the possession of Captain Belgard who in turn had contacted a Sergeant James E. McKenzie of the R.C.M.P. who in turn passed the information on to O'Hearn (Tr. 10, 20, 28, 39-40, 43, 47).

We have been able to find but one case, and that from the Third Circuit, which upheld a conviction on the basis that the Postal Regulations do not prohibit a "mail watch" and that such information may be furnished to Postal Inspectors but the Postal Inspectors may pass this information on to whom they see fit. *United States* v. *Schwartz,* 283 F.2d 107 (3rd Cir. 1960). The Court went on to say at page 111 "since there was no violation of the Postal Regulations we need not consider the question whether evidence obtained in violation of such regulations could be admissible in a Federal Court." The case was duly appealed to this Court which confirmed the conviction at 364 U.S. 942.

The *Schwartz* case dealt essentially with a mail watch but it is interesting in that it also dealt with violations of the Post Office regulations. In that particular instance the information had been leaked by the Postal Inspectors who had access to such information. But, it is respectfully submitted that the information in the instant case came from a postal clerk or assistant postmaster directly to (but not through a postal inspector) a police officer and eventually through to the customs people.

Oliver v. *United States,* 239 F.2d 819 (8th Cir. 1957) at page 822 suggested that "the legislative measures and administrative regulations may themselves be determinative of the official impropriety or legal unfairness of the acts done, so that there is no need to go further. Such it seems to us is, on the Postal Statutes and Regulations existing at the time of this search and seizure involved, the case that is before us." While that case involved the seizure and opening of a package without a Warrant, it is respectfully submitted that the reasoning is basically sound and in accord

with this Court's reasoning, although no case has been found on point.

We submit that there was ample known evidence by 2:35 p.m. on March 28, 1968, to show probable cause to obtain a Search Warrant. We submit first, that the detention of appellee's packages and the giving of information off of them to others than Postal Inspectors violated Postal Regulations and Postal Statutes and therefore the evidence should have been suppressed. Second, that even assuming that a brief detention were valid, the authorities had information to the effect that a) the packages contained coins insured for $10,000 on each package; b) the return address on each package was the same although fake; c) that one of the addressees was a known dealer in illegal trafficking of gold coins; and d) the person or persons mailing the packages drove away in a Canadian licensed vehicle (Statement), all of which provided the necessary probable cause for the issuance of a Search Warrant. This was not done.

The first and most important requirement of constitutionality is that the Warrant be based on probable cause. Although the latter term defies precise definition, it generally is held to exist where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that a crime has been committed. But establishing the fact of the crime is not enough. Probable cause for a Search Warrant also required facts sufficient to support a belief that instrumentalities or fruits of the crime, or contraband, are located in the place to be searched. *Jones* v. *U. S.*, 362 U.S. 257, 271 (1960).

> "The presence of a Search Warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. . . . We cannot be true to that constitutional requirement and excuse the absence of a Search Warrant without a showing by those who seek exemption from the constitutional mandates that the exigencies of the situation make that course imperative." *McDonald* v. *U. S.*, 335 U.S. 451, 455-456 (1948), is as true today as it was in 1948, if not more so.

The only two additional facts ascertained by the government after 2:35 p.m. on the date of mailing were cumulative, revealing nothing new: (1) that the second addressee was a suspected trafficker in gold coins and (2) that the Appellee had admitted to mailing the packages to R.C.M.P. Corporal Charles J. Crosson (Tr. 5-32, 36, 39-40; A. 5, 16).

Consider as an example the case of *Porter* v. *U. S.*, 335 F.2d 602 (9th Cir. 1964). An F.B.I. agent had filed Affidavits before a U. S. Commissioner stating that he sought certain items in Defendant's vehicle and named them with particularity. At the same time he asked for a Search Warrant for a second automobile stated to be that of the Defendant also. On his appeal the Defendant claimed that the Warrant failed to show probable cause for believing the articles listed would be found in the designated automobile. The Appellate Court rejected this argument, stating "Particularly in this case of two automobiles . . . it might be imprudent for the police to risk the possibility that the one which contained the evidence would be driven beyond reach while the other was being searched." *Id.* at 605. In short, probable cause turns upon probabilities,

not certainties and not necessarily eventual truth. *Brinegar* v. *U. S.*, 338 U.S. 160 (1949). It is based on the practical considerations of everyday life in which reasonable and prudent men, not legal technicians, act.

We believe that the holding by the Court of Appeals is correct and should be affirmed by this court in that:

> First class mail is protected by the Fourth Amendment. *Ex Parte Jackson,* 96 U.S. 727 (1878). *Oliver* v. *United States,* 239 F.2d 818 (8th Cir. 1957). In *Lustiger* v. *United States,* 386 F.2d 132 (9th Cir. 1967), the Court said:
>
> "The protection against unreasonable search and seizure of one's papers or other effects, guaranteed by the Fourth Amendment extends to their presence in the mails * * *. Thus, first class mail *cannot be seized and retained,* nor opened and searched, without the authority of a Search Warrant." 386 F.2d 139. (Emphasis added.)

The Fourth Amendment protects "the right of the people to be secure * * * in their papers and effects, against unreasonable searches and seizures." The information known to Captain Belgard immediately after Appellant mailed the packages would reasonably have justified a brief detention, without a warrant, while a further investigation would be made. *Terry* v. *Ohio,* 392 U.S. 1, 20-21 (1968); cf. *Warden* v. *Hayden,* 387 U.S. 294 (1967).

By 3:00 P.M., O'Hearn knew that the addressee of one of the packages was under investigation for trafficking in gold coins. This additional fact supplied probable cause to search the packages. Instead,

O'Hearn decided to wait until the following day so he could call the customs office at the destination of the second package. This decision represents an understandable exercise of caution. Nevertheless, as a result of this delay, the packages were detained for 29 hours at the post office. This period was unreasonably long, and the officers should have obtained a warrant authorizing the detention. *Katz* v. *United States,* 389 U.S. 347 (1967); *Lustiger* v. *United States, supra;* see *Davis* v. *Mississippi,* —— U.S. ——, 37 USLW 4359 (1969); *Camara* v. *Municipal Court,* 387 U.S. 523 (1967).

In *Katz,* the Government urged the Court to "retroactively validate" the conduct of its agents who had eavesdropped on the defendant's telephone conversations. The Government argued that the agents "did no more than they might properly have done with prior judicial sanction." 389 U.S. at 356. The Court rejected this argument:

> "It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer * * *. Searches conducted without Warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause,' * * * for the Constitution requires 'that the deliberate, impartial judgment of a judicial officer * * * be interposed between the citizen and the police * * *.'" 389 U.S. at 356-57.

In the present case, the length of time that the packages were retained by the post office made prior judicial authorization necessary (A. 24-25).

We submit that the United States postal and customs officials had probable cause at 2:35 p.m. (Pacific Standard Time) on March 28, 1968, and were required to obtain a warrant at that time in order to detain the packages any longer. If this Court should disagree with the immediate above submission, then surely, it will agree that the officials had probable cause early in the morning of March 29, 1968, after the telephone call to customs officials in Mobile, Alabama. But the officials did not apply for a warrant in the morning of March 29, 1968. Instead, they waited until 4 p.m. to apply. We submit that this unreasonable lapse of time after having probable cause violates the Fourth Amendment.

II.

A Search Warrant Granted Solely on an Affidavit Which Alleges Five Facts, Four of Them Being Based on Hearsay Evidence Compounded on Top of Hearsay Evidence Is a Violation of FRCP 41(e).

The Search Warrant should never have been issued. It was. The evidence obtained should have been suppressed. It wasn't. An analysis of the latest leading cases gives us a view of the problems involved.

It is elementary that in passing on the validity of a Warrant, the reviewing court may consider only information brought to the Magistrate's attention. *Giordenello* v. *United States,* 357 U.S. 480 (1958).

Ventresca v. *United States,* 380 U.S. 102 (1961) gives us the following guide lines:

1. The informed and deliberate determinations of the Magistrates impowered to issue Warrants are to be pre-

ferred over the varied actions of officers who may happen to make arrests.

2. In a doubtful or marginal case the search under Warrant may be sustained where without it the search would fall.

3. A Warrant must find probable cause but that means less than evidence which would justify condemnation and may rest on evidence not legally competent in a trial.

4. Hearsay may be the basis so long as there is a substantial basis for crediting the hearsay.

5. An Affidavit may be based on hearsay and need not reflect personal observations of the Affiant so long as the Magistrate is informed of some of the underlying circumstances supporting the Affiant's conclusions and his belief that the informant involved, whose identification needn't be disclosed, was credible or his information reliable.

6. Probable cause cannot be made out of Affidavits which are conclusory, i.e., those which state only beliefs without detailing the underlying circumstances.

7. Marginal cases should be given preference.

Jones v. *United States*, 362 U.S. 257 (1960), which is commonly cited for the rule that hearsay may be used in an Affidavit, was analyzed by Justice Douglas in *Ventresca* at page 121:

> In *Jones* the basis for crediting the informant's hearsay was (1) the Affidavit swore that the informant had previously given information to him which was cor-

rect; (2) the Affiant had been given corroborating information by other informants; and (3) the Affiant was independently familiar with the persons claimed by the informant to be concealing narcotics in their apartment, he knew them to have admitted to the use of narcotics.

This Court reversed the Court of Appeals and stated in effect that the Affidavit was based upon observations of the Affiant, his personal knowledge as well as information which he had received from other investigators assigned to the investigation. As a result, what happens when the above rules are applied to the facts given in the Affidavit for the issuance of a Search Warrant in the instant case?

Fact No. I: "Your Affiant has information through United States Customs channels that the addressees on the packages in question are known dealers in the illegal traffic of gold coins. This information came from U. S. Customs Agents" (A. 5). *Rule No. Four, supra,* applies to hearsay information. "Information through United States Customs channels" means what? The statement does not say anything other than this information came from U. S. Customs agents without the source being detailed. It is submitted that this would in effect give us a situation where we have hearsay on hearsay. But is there a substantial basis for crediting the hearsay?

Fact No. II: "Your Affiant has received information that when the packages were deposited with Post Office authorities in Mount Vernon, Washington, in response to an inquiry by the Postal Clerk to determine the contents of the packages, it was stated that the packages contained coins" (A. 6). *Rules Number Four and Five, supra,* would seem

to apply. But where is the *substantial basis* for crediting the hearsay? In assuming that the informant need not be identified there is nothing to inform the Magistrate of the underlying circumstances and whether the information is creditable or reliable.

Fact No. III: "Each of the packages were insured for $10,000" (A. 6). There is nothing whatsoever to indicate whether this is based on personal knowledge, hearsay, personal observations or what. There is no background given.

Fact No. IV: "The residence indicated as a return address on each package is now unoccupied and has been unoccupied for six weeks" (A. 6). Again the observations noted for Fact No. III would apply here.

Fact No. V: "Your Affiant has information obtained from Charles Bellgard (sic) of Mt. Vernon P. D. indicating that the persons who mailed the packages at Mount Vernon, Washington, were driving an automobile with Canadian license plates" (A. 6). This particular fact falls squarely within *Rule No. IV, supra,* and there is no disputing that it does have a substantial basis. However, we should note that the information has come from Captain Belgard through Sergeant McKenzie. (See Statement.) But once again this is hearsay based on hearsay. No factual background is given in the Affidavit.

As to the rest of the facts, do we have probable cause for the issuance of a Warrant? Granted that this is less than evidence which would justify condemnation and is not competent in a trial still, the Magistrate must be informed of the underlying circumstances. The Affiant must state that his sources of information are credible and reliable if he does not care to divulge the source. There are no personal

observations made as in *Jones*. There is no corroborating information from other sources. The Affiant was not independently familiar with the packages nor the persons mailing them. As a result the Search Warrant should never have been issued. Now it must be suppressed and the seized merchandise returned to appellee.

Accordingly, when the source of information is a reliable and confidential informant, the officer should set out the approximate time the informant got his information, how he got it, and the basis for the Affiant's belief that the informant is reliable, such as the fact that he had been used for a specified length of time, the approximate number and the type of cases in which he had previously given information, and a statement as to the accuracy of the information given by him in past cases. See, e.g., *Jones* v. *U. S.*, 362 U.S. 257 (1960).

It is respectfully submitted that it is not necessary, of course, that the officer state all the facts known about the case, but only enough information for the commissioner or Magistrate to determine from a reading of the Affidavit by itself, that there is sufficient probable cause to justify the issuance of a Warrant.

III.

Reply to Government's Argument.[1]

1. Reply to: Introduction and Summary

The government contends that federal customs and postal officials conducted an overnight investigation in order to

[1] Citations to the Government's Brief will be given as G. 1, G. 15, etc.

confirm suspicions created by the circumstances of Respondent's mailing of the two packages (G. 4, 5). That this is not so is borne out by the government's Statement (G. 3) that by 3 p.m. Officer O'Hearn had phoned the customs office in Van Nuys and learned that the addressee of one of the packages was under investigation for trafficking in illegal coins. But "because of the time differential, O'Hearn could not reach the customs office in Nashville, Tennessee, the destination of the other package on the same afternoon (G. 3, G. 3 n2). Furthermore, there is not one statement anywhere in the Record, and the Government has given no citation, indicating or supporting the view that postal and/or customs officials conducted any type of overnight investigation in order to confirm or explore further their suspicions created by Respondent's mailing of two packages. Their suspicions and probable cause were complete as of 2:35 p.m. March 28, 1968. (See Statement.)

The Court of Appeals did not find "that the Warrant was properly issued on sufficient facts to justify a search; nor did it question the government's right to seize and retain the coins which the search uncovered" (G. 5). It is respectfully submitted that the Court of Appeals did not reach this issue (A. 23).

The Government would try to analogize between the detention of an individual for a period of time and the detention of personalty for a like period. However, detention of an individual can be tested by a Writ of Habeas Corpus. There is no comparable testing for personalty.

When the government states that there is "no relationship whatever in this case between the detention of the packages and the investigation which produced the facts to

justify the Warrant" (G. 6) it is correct. The detention of the packages lasted at least twenty-nine hours and the investigation which produced the facts necessary to justify a Warrant took only two hours. Therefore, the officers had a choice: either to obtain a Search Warrant or to continue their investigation of the packages after their having been sent on their way under the aegis of a mail watch.

The Government would have us believe that by delaying the application for a Warrant until the following morning the Court of Appeals held that the agents had detained the packages unreasonably (G. 7). In fact, the government did not apply for a Search Warrant until 4 p.m. the following day. (See Statement.) Therefore, assuming that the detention overnight were reasonable, we have nothing stating the reasonableness from morning until late afternoon.

At some point in time the Government has unreasonably detained the Appellee's packages and as such their introduction into evidence against him should have been suppressed as the Court of Appeals so held. Furthermore the question arises as to the status of the packages. They were not under the Appellee's control, therefore they should have proceeded on their journey.

The Government goes on to state that "the Court below erroneously read the Fourth Amendment to prohibit governmental conduct which is entirely consistent with the practice of prior judicial authorization for searches with which the Amendment contemplates (G. 7). However there is no citation of case authority nor has one been found to back this statement.

2. Reply to the argument that: THE DETENTION OF RESPONDENT'S PACKAGES FOR A REASONABLE TIME NEEDED TO MAKE A LIMITED INVESTIGATION AND APPLY FOR A SEARCH WARRANT DID NOT VIOLATE THE FOURTH AMENDMENT (G. 7).

1). We agree that "this Court's opinions lend support to the proposition that the Fourth Amendment allows law enforcement officers to take limited action, reasonable under the circumstances, to prevent the removal or destruction of suspected property pending the issuance of a Search Warrant" (G. 7-8). However the time delay in this case was unreasonable. The cases cited by the government do not seem to have an intervening statute which would seem to control. In the instant case we are dealing with the detention of mail which is protected by Congress having enacted specific statutes under the United States Code, Title 39 entitled THE POSTAL SERVICE.

As a result the period of watching the premises from which government agents observed or had smelled the odor of whiskey in *Taylor* v. *United States*, 286 U.S. 1, 6 (1932), is a situation where the Defendants had the premises under their control. The same holds true for *Trupiano* v. *United States*, 334 U.S. 699 (1948). In each of these instances cited the property was under the control of the suspects whereas in the instant case the property was within the control and the possession of a governmental entity i.e., the Post Office.

Granted that an agent is authorized not only to watch but to guard others from removing the property but, a mail watch would have sufficed in this instance. Would the government have us believe that it is necessary to have one governmental agency restrict another govern-

mental agency from removing property so that it is not sent on its way?

While it is true that the rights of private individuals are unavoidably interfered with when agents take action to prevent the removal or destruction of suspected property pending the issuance of a Search Warrant, in this particular instance there are no private individuals seeking to inhibit the government's actions. Since the only means of detaining property is spelled out in the government regulations under the mailability section there would seem to be no basis for the detention of the packages at all. Hence, the Court of Appeals had suggested that an interim detention be done under Court authorization which is most reasonable, especially in light of *Commerford* v. *Thompson*, 1 F. 417 (Cir. Ct. Ky. 1880). "While the Fourth Amendment does not compel the creation of a novel procedure to warrant such detention" (G. 9) it is respectfully submitted that the statutory law does under the present circumstances.

The searches of automobiles and arrests and incidental searches of persons are entirely independent circumstances and are not regulated by statute as are the packages in the first-class mail and their movement in the instant case.

"Where the circumstances unmistakably establish probable cause to search the property, it is hardly to be doubted that the officer acts reasonably by detaining the property without search, during the time required to prepare the Affidavit and a Warrant and to obtain a Magistrate's disposition on the application" (G. 10). While this is undoubtedly true, in this particular case the Appellee had no control over the property once he had deposited it in the mails. As a result to uphold the Government's conten-

tion in this instance would enable the investigating authorities to go forum shopping for a Magistrate willing to issue a Search Warrant. If it cannot be obtained at the place where the packages are deposited then it can be obtained at the destination of the packages. It is respectfully suggested that the destination being known that this is what would eventually result.

The Government goes on to state that the detention of the packages in order to give the officers time to make relative inquiries is justified. But, the packages should have been sent on their way and, as stated by Circuit Judge Chambers, in his concurring opinion:

> I think I am as sensitive as anyone to the Fourth Amendment in protecting one's person and one's home. But the detention of Van Leeuwen's "hot money" at the postoffice for 29 hours does not offend me very much. Someone in the postoffice holds up much of my mail over 29 hours.
>
> I concur in the reversal only because I think precedent, which we must follow, requires us to reverse (A. 26).

As in the case of other actions which interfere with either personal or property rights the conduct of law enforcement officials must be reasonable under the circumstances. The interference "must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible". In assessing its legality under the Fourth Amendment, the "inquiry is a dual one—whether the officer's action was justified at its conception, and whether it was reasonably related in scope to the circumstances

which justified the interference in the first place." *Terry* v. *Ohio,* 392 U.S. 1, 19-20 (1968) (G. 11).

A careful analysis of this quotation is necessary. "The conduct of law enforcement officials must be reasonable under the circumstances." This court has previously held in *Draper* v. *United States,* 358 U.S. 308 (1959) and other cases, that the violation of a statute calls for the suppression of evidence in a Federal Prosecution.

Secondly *Terry* related to a search and frisk operation and not to the detention of a person or item for 29 hours.

2). The Government states that it would have been "unwise to send the packages out of the district, with the possible risk of loss or destruction of evidence, without their ever having been opened" (G. 13). The packages were under the control of the United States Government at all times. The fact that the issuance of two Search Warrants may have been required does not absolve the government from detaining the packages for an unreasonable length of time. The Government would suggest that the additional time required would take additional manpower. Once again we bring only to the Court's attention the availability of the mail watch.

3. Reply to the argument that: THE PERIOD DURING WHICH THE PACKAGES WERE DETAINED WAS NOT UNREASONABLE (G. 13).

The Court of Appeals did not fault the Government for waiting until the following day so much as it faulted the Government for not acting when it had sufficient information on which to obtain a Search Warrant. Nowhere has the Government cited a case wherein the exercise of cau-

tion by an officer for such a lengthy period of time *after* having reasonable cause has been upheld.

The Government's argument is specious that "if it has any bearing on the question here, the fact that the officers already had probable cause to search supports the reasonableness of their conduct, because it eliminates the risk that the packages were being held without likelihood that a warrant would be issued." (G. 14). However, it is unable to cite a case that the likelihood of a Warrant being issued is a basis for detaining property for such a lengthy period of time after having once obtained reasonable cause.

In this day of instant communication, the Government was able to obtain information to the effect that one of the packages was addressed to a trafficker in illegal gold coins. Therefore the Government had reason to believe that the other package was also addressed to a trafficker in illegal gold coins.

The Government's argument (at G. 15) would have us believe that it was necessary to obtain information relating to the Nashville addressee before a Magistrate would issue a Warrant. But at no time did the Government submit the information which it did have by 2:35 p.m. on the date of mailing of the packages to a Magistrate. If it had done so it may have succeeded in obtaining a Warrant. That this was not done is no excuse for waiting an additional 24 hours. Had the Government done so and, if it had not obtained a Warrant, then, and in that case, the longer detention may have been reasonable.

Conclusions

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be confirmed when post office and/or customs officials knowingly detain registered, first-class packages for at least 24 hours after said officials were in possession of information sufficient to enable them to obtain a Search Warrant to open the packages and discover whether they contained illegal matter and did not do so.

The decision should be further affirmed in that the Search Warrant was granted solely on an Affidavit which alleged five facts, four of them being based on hearsay evidence compounded on top of hearsay evidence such Affidavit not being consonant with this Court's directions.

Respectfully submitted,

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APPENDIX

APPENDIX

United States Constitutional Provisions, United States Statutes, Regulations From the Code of Federal Regulations Involved and Federal Rules of Criminal Procedure

I.

United States Constitution

Amendment IV: The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

II.

United States Code

18 U.S.C. § 545 Smuggling goods into the United States

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

The term "United States", as used in this section, shall not include the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island or Guam. June 25, 1848, c. 645 62 Stat. 782; Sept. 1, 1954, c. 1213, Title V, § 507, 68 Stat. 1141; June 30, 1955, c. 258, § 2(c), 69 Stat. 242.

18 U.S.C. § 1701 Obstruction of mails generally

Whoever knowingly and willfully obstructs or retards the passage of the mail, or any carrier or conveyance carrying the mail, shall be fined not more than $100.00 or imprisoned not more than six months, or both. June 25, 1948, c. 645, 62 Stat. 778.

18 U.S.C. § 1702 Obstruction of correspondence

Whoever takes any letter, postal card, or package out of any postoffice or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any postoffice or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 778.

39 U.S.C. § 710 Making up mail

Letters brought for mailing to a post office half an hour before the time for the next forwarding mail shall be in-

cluded therein unless, in the opinion of the Postmaster General, more time for making up the mail is required, they may be included in mail to be forwarded not more than one hour thereafter. Pub.L. 86-682, Sept. 2, 1970, 74 Stat. 584.

39 U.S.C. § 4057 Opening first class mail

Only an employee opening dead mail by authority of the Postmaster General, or a person holding a search warrant authorized by law may open any letter or parcel of the first class which is in the custody of the Department. Pub.L. 86-682, Sept. 2, 1970, 74 Stat. 657.

39 U.S.C. § 4251 Definition

(a) First class mail consists of mailable (1) postal cards, (2) postcards, (3) matter wholly or partially in writing or typewriting, except as provided in sections 4365, 4453, and 4555 of this title, and (4) matter closed against postal inspection . . . Pub.L. 86-682, Sept. 2, 1970, 74 Stat. 663.

III.

Code of Federal Regulations

Title 39 Postal Service

Revised January 1, 1968

39 C.F.R. § 113.7 Mail covers

Authority to order a mail cover is restricted to the Chief Postal Inspector or your postal Inspector in charge. Upon request of either of these officials, furnish them with information regarding the address, return address or postmarks on mail. When specifically requested by the Chief Postal Inspector or your inspector in charge furnish such information to a designated postal inspector. Do not give such information to anyone else. Requests for mail covers shall be treated confidentially and there shall be strict compliance with the instructions outlined in the request.

39 C.F.R. § 124.9 Opinions on mailability

(a) When in doubt as to the mailability of any matter described in §§ 124.2, 124.3, and §§ 125.2, 125.3, and 125.4 of this Chapter, the postmaster shall submit a sample or a complete statement of the facts to the Classification and Special Services Division, Bureau of Operations and await instructions.

(b) Postmasters and other employees at post offices shall not give opinions to the public concerning the mailability of matter under §§ 124.4, 124.5, 124.6, 124.7, 124.8 and §§ 125.5, 125.6 of this chapter. When in doubt as to the mailability of any such matter, the postmaster shall withhold it from dispatch or delivery, and shall send a sample or a complete statement of the facts to the Mailability Division Office of the General Counsel, for instructions. Newspapers containing doubtful matter should be promptly reported to the Mailability Division, Office of the General Counsel, but they should not be withheld from dispatch without specific instructions.

39 C.F.R. § 131.2 Classification

(a) *Description.* (1) First-class mail includes:

(i) Letters.

(ii) Postal and post cards.

(iii) Airmail weighing not to exceed 8 ounces whether sealed or unsealed.

(iv) All matter wholly or partly in writing, except authorized additions to second-, third-, and fourth-class mail. See subparagraph (2) of this paragraph.

(v) Matter sealed or closed against inspection. See §§ 126.2(e), 134.8(a), and 135.7 of this chapter for mailing of sealed publications at second-class rates of postage and sealed parcels at the third- or fourth-class rates of postage. . . .

39 C.F.R. § 161.3 Registration

(a) *What may be registered.* All mailable matter prepaid with postage at the first class or airmail rate may be registered. Stamps or meter stamps must be attached to the mail representing all postage and fee charges. Business reply mail may not be registered unless postage and all fees are fully prepaid.

(b) *Where to mail.* Registration may be obtained by presenting mail to:

(1) *Post offices and their branches and stations.* Postmasters will accept mail of unusually high value only at the main office or the larger branches and stations. . . . (26 F.R. 11587, Dec. 6, 1961, as amended at 27 F.R. 6979, July 24, 1962; 31 F.R. 8236, June 11, 1966. Redesignated at 31 F.R. 15350, Dec. 8, 1966)

IV.

Federal Rules of Criminal Procedure

Effective July 1, 1968

Rule 41 Search and Seizure

(e) Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any

hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

As amended Dec. 27, 1948, eff. Oct. 20, 1949; April 9, 1956, eff. July 8, 1956.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 403.—October Term, 1969

United States, Petitioner, *v.* Gerritt Johannes Van Leeuwen	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[March 23, 1970]

Mr. Justice Douglas delivered the opinion of the Court.

Respondent, at about 1:30 p. m. on Thursday, March 28, 1968, mailed two 12-pound packages at the post office in Mt. Vernon, Washington, a town some 60 miles from the Canadian border. One package was addressed to a post office box in Van Nuys, California, and the other to a post office box in Nashville, Tennessee. Respondent declared they contained coins. Each package was to be sent airmail registered and each was insured for $10,000, a type of mailing that the parties agree was first class, making them not subject to discretionary inspection.[1]

When the postal clerk told a policeman who happened to be present that he was suspicious of the packages, the policeman at once noticed that the return address on the packages was a vacant housing area of a nearby junior college, and that the license plates of respondent's car were British Columbia. The policeman called the Canadian police, who called customs in Seattle. At 3 p. m. that afternoon customs called Van Nuys and

[1] 39 CFR § 131.2 describes "first class" mail as "matter closed against postal inspection," which follows the definition in 39 U. S. C. § 4251 (a).

learned that the addressee of one package was under investigation in Van Nuys for trafficking in illegal coins. Due to the time differential, Seattle customs was unable to reach Nashville until the following morning, March 29, when Seattle was advised that the second addressee was also being investigated for the same crime. A customs official in Seattle thereupon filed an affidavit for a search warrant for both packages with a United States commissioner, who issued the search warrant at 4 p. m., and it was executed in Mt. Vernon at 6:30 p. m., 2½ hours later. Thereupon the packages were opened, inspected, resealed, and promptly sent on their way.

Other evidence showed that respondent had brought the two packages in from Canada without declaring them. He was tried for illegally importing gold coins in violation of 18 U. S. C. § 545 and found guilty and sentenced and fined. On appeal, the Court of Appeals reversed, holding that the coins were improperly admitted in evidence because a timely warrant had not been obtained. 414 F. 2d 758. The case is here on a petition for a writ of certiorari, 396 U. S. 885. We reverse.

It has long been held that first class mail such as letters and sealed packages subject to letter postage—as distinguished from newspapers, magazines, pamphlets, and other printed matter—is free from inspection by postal authorities, except in the manner provided by the Fourth Amendment. As stated in *Ex parte Jackson*, 96 U. S. 727, 733, decided in 1878:

> "Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domicils. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against

> inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to seach in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution."

The course of events since 1878 has underlined the relevance and importance of the Post Office to our constitutional rights. Mr. Justice Holmes in *Milwaukee Pub. Co.* v. *Burleson*, 255 U. S. 407, 437 (dissenting opinion), said that "the use of the mails is almost as much a part of free speech as the right to use our tongues." We have emphasized over and again that while Congress may classify the mail and fix the charges for its carriage, it may not set up regimes of censorship over it, *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, nor encumber its flow by setting up "administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail" to him.[2] *Lamont* v. *Postmaster General*, 381 U. S. 301, 306. Yet even first class mail is not beyond the reach of all inspection; and the sole question here is whether the conditions for its detention and inspection had been satisfied. We think they had been.

The nature and weight of the packages, the fictitious return address, and the British Columbia license plates of respondent who made the mailings in this border town

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[2] The question as to the right of the addressee to stop deliveries is a separate and distinct one. See *Rowan* v. *Post Office, post*, —.

certainly justified detention, without a warrant, while an investigation was made. The "protective search for weapons" of a suspect which the Court approved in *Terry* v. *Ohio*, 392 U. S. 1, 20–27, even when probable cause for an arrest did not exist, went further than we need go here. The only thing done here on the basis of suspicion was detention of the packages. There was at that point no possible invasion of the right "to be secure" in the "persons, houses, papers, and effects" protected by the Fourth Amendment against "unreasonable searches and seizures." Theoretically—and it is theory only that respondent has on his side—detention of mail could at some point become an unreasonable seizure of "papers" or "effects" within the meaning of the Fourth Amendment. Detention for 1½ hours—from 1:30 p. m. to 3 p. m.—for an investigation certainly was not excessive; and at the end of that time probable cause existed for believing that the California package was part of an illicit project. A warrant could have been obtained that day for the one package; yet the mystery of the other package remained unsolved and federal officials in Tennessee could not be reached because of the time differential. The next morning they were reached and it was learned that the second package was also probably part of an illicit project. By 4 p. m.—or 26½ hours after the mailing in Mt. Vernon—a search warrant was obtained in Seattle and at 6:30 p. m., or 29 hours after the mailing, the search warrant reached Mt. Vernon, a speedy transmission considering the rush-hour time of day and the congested highway.

No interest protected by the Fourth Amendment was invaded by forwarding the packages the following day rather than the day when they were deposited. The significant Fourth Amendment interest was in the privacy of this first class mail; and that privacy was not disturbed or invaded until the approval of the magistrate was obtained.

The rule of our decision certainly is not that first class mail can be detained 29 hours after mailing in order to obtain the search warrant needed for its inspection. We only hold that on the facts of this case—the nature of the mailings, their suspicious character, the fact that there were two packages going to separate destinations, the unavoidable delay in contacting the more distant of the two destinations, the distance between Mt. Vernon and Seattle—a 29-hour delay between the mailings and the service of the warrant cannot be said to be "unreasonable" within the meaning of the Fourth Amendment. Detention for this limited time was, indeed, the prudent act rather than letting the packages enter the mails and then, in case the initial suspicions were confirmed, trying to locate them enroute and enlisting the help of distant federal officials in serving the warrant.

Reversed.